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Army Act—*Continued.*

jurisdiction to a Court of Small Causes in all actions of debt and personal actions against persons subject to military law (other than soldiers in the regular forces) over which such Court would ordinarily exercise jurisdiction, and provides a Court of Requests (s. 148) for those cases only where an action of the value of Rs. 400 or under has to be brought against such persons at a place lying beyond the jurisdiction of any Small Cause Court. *Held*, also, that the words "within the jurisdiction" in s. 151, cl. 1, referred to "actions" and not to "persons." SHEEB ALI *v.* C. L. PRENDERGAST 143

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Bengal Act VIII of 1869—*Continued.*

granted where waste lands in that estate have been brought into cultivation by various ryots, and the landlord is unable to ascertain which of the ryots have appropriated such waste lands as part of their jotes. Before a measurement can be ordered under that section, it is necessary to establish by evidence the facts set out in the petition for measurement; and to show that the lands sought to be measured are known, but that the tenants liable to pay rent in respect of such lands are unknown. LALLA CHEDI LAL *v.* RAMDHUNI GOPE ... 57

——————— **s. 52**—*Decree for rent, Execution of—Appellate Court, Decree of, Effect of—Liability to Ejectment.*] A decree under s. 52, Bengal Act VIII of 1869 provided that unless the amount due was paid within 15 days from the date thereof, the tenant (judgment-debtor) would be liable to ejectment. That decree was confirmed in appeal, *no step to execute it having been taken in the meantime.* The tenant paid the decretal amount into Court within 15 days of the appellate decree. *Held*, that inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree, and was the only decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within 15 days of that decree was protected from ejectment. NOOR ALI CHOWDHURI *v.* KONI MEAH 13

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Bengal Municipal Act—*Continued.*

shall hereafter be made, and the pavements, stones and other materials thereof, and all erections, materials, implements and other things provided therefor, shall vest in, and belong to, the Commissioners." *Held*, that the word "roads" in this section does not include the soil beneath the roads. CHAIRMAN OF THE NAIHATI MUNICIPALITY *v.* KISHORI LALL GOSWAMI 171

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———————, ss. 49, 97—*Civil Procedure Code Act (XIV of* 1882), *ss* 3, 4, 540—*Limitation Act (XV of* 1877), *Sch. II, Art* 156.] An appeal from the Court of the Recorder of Rangoon to the High Court is an appeal under the Civil Procedure Code, and must be made within the time prescribed by Article 156, Sch. II of the Limitation Act. AGA MAHOMED HAMADANI *v.* COHEN ... 221

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of 1876, s 243—*Conviction for keeping animals*

Calcutta Municipal Act—*Continued.*

without license—Continuing offence between date of summons and date of conviction—Second prosecution for same offence on different date before conviction.] Under s. 248 of Bengal Act IV of 1876, a milkman, who has been convicted and fined for keeping an animal without a license, cannot again be prosecuted for the continuance of the same offence before conviction, nor can he be separately prosecuted for the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction. In a summons taken out on the 27th March against a milkman for an offence under s. 248, Bengal Act IV of 1876, the offence was stated to have been committed on the 16th March; the case was fixed for the 8th April, when the defendant was convicted and fined by the Magistrate. Another summons had been taken out against him on the same day (27th March) for a similar offence stated to have been committed on the 25th March. *Held*, that he could not be convicted on the second charge. IN THE MATTER OF THE CORPORATION OF THE TOWN OF CALCUTTA *v.* MATOO BEWAH 108

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——————, 1882, s. 244—*Suit to recover purchase money on reversal of decree under which Sale in execution took place—Separate suit—*

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Party to proceedings in execution.] *G* instituted a suit against *H*, *C* and *P*, which was dismissed with costs, but an appeal was preferred. Pending the appeal, however, *C* took out execution of the decree for costs, and brought to sale a house belonging to *G*, of which *H* became the purchaser, paid the purchase money, and got possession. Subsequently the decision dismissing the suit was reversed on appeal, and the defendants in that suit were ordered to pay a certain sum to *G* with costs. *G* then applied for restitution of her house which had been sold under the decree reversed, and eventually obtained an unconditional order for possession, *H* being left to any remedy open to him in respect of the purchase money. *G* having obtained possession of the house, *H* brought a suit against her to recover the purchase money: *Held*, that notwithstanding s. 244 of the Civil Procedure Code, he was entitled in this suit to recover the purchase money, as money received to his use, the consideration for it having failed. *H* was not in his character as an auction-purchaser, a party to the execution proceedings, and for the purpose of the suit was to be treated as a third person. HIRA LAL CHATTERJEE *v.* GOURMONEY DEBI 326

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——————, ss. 295, 622—*Rateable distribution—Assets realized "by sale or otherwise"*] The words of s. 295 of the Code of Civil Procedure, "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors. The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code. SEW BUX BOGLA *v.* SHIB CHUNDER SEN 225

——————, s. 311—*Application to set aside sale—"Person whose property has been sold"—Mortgagee—Transfer of Property Act (IV of 1882), ss. 86, 87.*] The mortgagees of a certain tenure obtained, on 11th September 1884, under s. 86 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under s. 311 of the Civil Procedure Code to have the sale set aside for material irregularity. *Held*, that under s. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of s. 311, "person whose property has been sold," and entitled them to make the application. RAKHAL CHUNDER BOSE *v.* DWARKA NATH MISSER 346

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——————, s. 540. *See* BURMA COURTS ACT, s. 49 ... 221, 232

——————, s. 588, CL. 2. *See* APPEAL 100

——————, s. 622—*Material irregularity affecting merits of case*] The words "a material irregularity," in s. 622 of the Code of Civil Procedure include an irregularity of procedure materially affecting the merits of the case. An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section. *Magni Ram* v. *Jiwa Lal*, I. L. R., 7 All., 336, observed on. SEW BUX BOGLA *v.* SHIB CHUNDER SEN 225

——————, ss. 622 AND 32—*Interpleader suit, Application to be made a party to—Power of High Court on Revision—Erroneous construction of Act.*] A merely erroneous construction of the provisions of an Act is not a ground for relief under s. 622 of the Civil Procedure Code. *M J* instituted an interpleader suit against two rival claimants, *N* and *A*, in respect of a sum of Rs. 20,000. *R* subsequently claimed a portion of the money and applied to be made a party to the suit; but was opposed by *M J* and *N*. The Subordinate Judge refused the application on the ground that, though it was probably made under s. 32 of the Civil Procedure Code, *R's* right or claim not having been admitted by the plaintiff nor asserted to his knowledge, she was not a necessary party under the special provisions of Chapter XXXIII of the Civil Procedure Code, and referred her to a regular suit. *Held*, that the order, though based upon an erroneous construction of the provisions of s. 32 of the Code, did not come within the scope of s. 622, inasmuch as it could not be said that the Subordinate Judge had failed to exercise a jurisdiction vested in him by law. RABBABA KHANUM *v.* NOOR JEHAN BEGUM, *alias* DALIM SHAHIBA ... 90

——————, s. 623. *See* REVIEW 62

——————, s. 624. *See* REVIEW 231

Claim to attached Property. *See* COURT FEES ACT 162

Client, Dissent of, to compromise. *See* COMPROMISE 115

Commission payable to Official Assignee. *See* INSOLVENCY 66

Commissioners. *See* BENGAL MUNICIPAL ACT, s. 32 171

Committal to Court of Sessions. *See* MAGISTRATE, JURISDICTION OF... ... 305

Compensation. *See* BENGAL MUNICIPAL ACT, s. 32 171

——————— *Cattle Trespass Act*, 1871, *ss.* 20, 22—*False complaint.*] A complaint was made against certain persons under s. 20 of the Cattle Trespass Act of 1871, charging them with having illegally seized and detained the complainant's cattle. The Assistant Magistrate who heard the complaint found it to be false, and he ordered the complainant to pay Rs. 20 compensation to the accused, and in default to suffer simple imprisonment for 21 days. On application to the High Court: *Held*, that the order was illegal and must be set aside. IN THE MATTER OF KALA CHAND *v.* GUDADHUR BISWAS 304

Complaint. *See* CRIMINAL PROCEDURE CODE, ss. 191, 202, 203 334

Compromise—*Compromise made notwithstanding dissent of client—Counsel's powers to compromise—Consent decree set aside.*] Where Counsel, after consulting with his attorney and client as to the advisability of compromising a case, and after receiving instructions from the attorney "to do the best he could for his client," compromised the case, notwithstanding the express prohibition of the client; and the client before the consent decree was drawn up notified her dissent to the other side: *Held*, that the consent decree must be set aside. CARRISON *v.* RODRIGUES 115

Compromise of suit—*Compromise extending beyond the terms of the suit—Civil Procedure Code (Act XIV of* 1882), *s.* 375—*Compromise, Modification of terms of.*] The only compromise which a Court can in any case be bound under s. 375 of the Code of Civil Procedure to enforce, is one which adjusts, wholly or in part, the suit; matters going beyond the suit cannot, if included in a compromise, be so enforced. A Court refusing to grant a decree on a compromise going beyond the suit, cannot however grant a decree modifying the terms of the proposed compromise, but must leave the parties to proceed with the suit as they may be advised. FAJALEH ALI MIAH *v.* KAMARUDDEN BHUYA ... 170

Consent Decree set aside. *See* COMPROMISE 115

Continuing Offence between date of Summons and Conviction. *See* CALCUTTA MUNICIPAL ACT, s. 248 108

Contract, Breach of—*Alleged breach of warranty by vendor on a sale and delivery of goods—Burden of proof after acceptance, following upon an examination by purchaser.*] Under five contracts for the sale of good Burma cutch, to be delivered to a Calcutta firm in Calcutta by the vendors, who knew that it was bought for the export market, delivery and acceptance followed upon a searching examination of the cutch by the purchasers. The latter having sent advices of this purchase to a New York firm, with which they were in partnership, parcels of cutch were sold to different buyers in America, to whom, under such "forward" contracts, the cutch was shipped in separate shipments by the Calcutta firm. On the arrival of the cutch objection was taken to its quality by the American buyers, who refused to take delivery. The Calcutta firm, thereupon, sued the vendors under the five contracts above mentioned. The burden of proof being upon the plaintiffs, who had accepted the cutch after full examination in Calcutta, to prove the breach of contract by the vendors by cogent evidence sufficient to rebut the presumption of due performance that arose from such acceptance, *held*, that this presumption was not rebutted in the absence of evidence as to the treatment of the cutch on its re-shipment by the plaintiffs, on the voyage from India to America, and at the port of arrival. GAN KIM SWEE *v.* RALLI BROTHERS 237

——————————, **Damages for.** *See* RIGHT OF SUIT 300

——————— **Act,** ss. 60, 74. *See* INTEREST. 164

——————— s. 74. *See* INTEREST ... 200

——————— *See* MORTGAGE ... 262

Contribution, Suit for. *See* RIGHT OF SUIT 300

Conveyance by vendors under one denomination to same persons purchasers under another denomination. *See* STAMP ACT, 1879, SCH. I, ART. 21 ... 43

Conviction in non-appealable Case. *See* PRESIDENCY MAGISTRATE 272

——————— **for keeping animals without License.** *See* CALCUTTA MUNICIPAL ACT. s. 248 108

Cooch Behar, Decree of Court of. *See* FOREIGN COURT, DECREE OF ... 95

Copy of Decree, Time for obtaining. *See* LIMITATION ACT, 1877, s. 12 ... 104

Co-sharers—*Notice to quit—Co-sharers, Suit by—Withdrawal of one co-sharer from the suit—Ejectment, Suit for.*] Where several co-sharers have served a joint notice to quit, upon which notice they jointly institute a suit for the recovery of the land, the fact that one of the plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land. DWARKA NATH RAI *v.* KALI CHUNDER RAI 75

Costs. *See* WILL, CONSTRUCTION OF ... 193

Counsel. Mistake of. *See* REVIEW ... 62

——. **Power of, to compromise.** *See* COMPROMISE 115

Court executing Decree, Power of. *See* POSSESSION, SUIT FOR 283

——. **Power of, to add Party.** *See* PARTIES 90

—— **Fees Act**—(*VII of* 1870), *Sch. I, and Sch. II, Art.* 7, *cl.* 3—*Suit after rejection of claim to attached property—Ad valorem Stamp.*] In execution of a decree by the defendant, certain property was attached as being that of the judgment-debtor. The plaintiff preferred a claim, but his claim was disallowed, and the property ordered to be sold. In a suit to have it declared that the property belonged to the plaintiff: *Held*, it was a suit in which consequential relief was asked for, and that the *ad valorem* duty prescribed by Schedule I of the Court Fees Act was payable on the plaint, and not that provided by Schedule II, Art. 17. *Jalaluddin Mahomed* v. *Shohorullah*, 15 B. L. R., Ap. 1; 22 W. R., 422, followed. AHMED MIRZA SAHEB *v.* A. THOMAS 162

Court of Wards in Oudh. *See* LUNATIC 81

Courts of Request, Jurisdiction of. *See* ARMY ACT, ss. 148, 151 143

Covenant, Breach of. *See* RIGHT OF SUIT 300

Criminal Procedure Code, s. 133—*Public way—Nuisance—Removal of obstruction—Jury—Majority of Jury.*] When a minority of a jury appointed under the provisions of s. 133 of the Criminal Procedure Code do not act, the Magistrate cannot proceed under that section upon a report submitted by the majority. IN THE MATTER OF DURGA CHARAN DAS *v.* SASHI BHUSAN GUHO... ... 275

——————, **s. 145**—*Julkur right—Tangible immoveable property—Dispute regarding a Julkur.*] A dispute concerning a *julkur* right is not a dispute concerning "tangible immoveable property" within the meaning of s. 145 of the Code of Criminal Procedure, and cannot be inquired into by a Magistrate under the provisions of that section. ANUND MOYI DABIA *v.* SHURNOMOYI ... 179

——————, **s. 145**—*Penal Code, s.* 188—*Disobedience to order of public servant—Inquiry as to possession—Parties to inquiry.*] In May 1883 the District Magistrate of Tipperah held an inquiry as to the possession of certain lands claimed by *A* and *B*, and having found on the evidence taken by him that *A* was in possession, he passed an order on the 21st of May 1883, declaring that *A* was entitled to hold possession of the disputed land until evicted in due course of law, and forbidding *B* and all others to disturb *A's* possession until such disturbance should be effected in due course of law. Previously to November 1885, *B* sold an eight-anna share of his interest in the disputed land to *C*, who, at the time of his purchase, had notice of the order of the 21st of May 1883. In November 1885, *B* and others went to the disputed lands, and attempted to turn *A* out of possession by force, and to compel the tenants of the lands to pay rent and give kabuliats to *B* and *C*. At the time that *B* and his companions went to the disputed land, the latter were aware of the order of the 21st of May 1883, though none of them was a party to the inquiry then made by the District Magistrate. In December 1885, they were all tried and found guilty of disobedience to an order duly promulgated by a public servant. *Held*, that the conviction was right. *Semble*, that a reference by a Magistrate to a Police report which clearly sets out the probability of a breach of the peace is a sufficient statement of the reasons for the Magistrate's being satisfied of the existence of a dispute likely to cause a breach of the peace, within the meaning of s. 145 of the Code of Criminal Procedure. GOLUCK CHANDRA PAL *v.* KALI CHARAN DE ... 175

——————, **ss. 191, 202, 203**—*Complaint—Magistrate, Power of—"May take cognizance of," Meaning of.*] The use of the term "may take cognizance of any offence" in s. 191 of the Criminal Procedure Code does not make it optional with a Magistrate to hear a complainant, but refers rather to the action of the Magistrate in taking cognizance of an offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant and then can either issue summons to the accused or order an enquiry under s. 202, or dismiss the complaint under s. 203. UMER ALI *v.* SAFER ALI ... 334

——————, **s. 195.** *See* PENAL CODE, s. 182 270

——————, **s. 239.** *See* MAGISTRATE, JURISDICTION OF ... 305

——————, **ss. 357, 424.** *See* JUDGMENT 110

——————, **s. 360.** *See* DISCHARGE OF ACCUSED ... 121

——————, **ss. 370, 437.** *See* PRESIDENCY MAGISTRATE ... 272

Cross-Appeal. *See* ACCOUNT ... 124

Cy pres, Doctrine of. *See* WILL, CONSTRUCTION OF 193

Damages for Breach of Contract. *See* RIGHT OF SUIT 300

Debt, Acknowledgment of. *See* LIMITATION ACT, s. 19 292

Debts of deceased person. Right to recover. *See* CERTIFICATE OF ADMINISTRATION 47

Declaratory Decree—*Specific Relief Act (I of 1877), s. 42—Discretion of Court to give a declaratory decree—Landlord and tenant—Notice to quit—Tenant setting up larger interest than he is entitled to.*] A plaintiff, admitting a defendant's right to a *kursa-jama* tenure in certain lands, but denying a permanent *malguzari* tenure set up by him, sought to eject the defendant from the *kursa-jama* holding, and for a declaration that the defendant was not entitled to the permanent *malguzari* tenure, *held*, that the plaintiff was entitled to the declaration asked for, notwithstanding that in consequence of his failure to prove a reasonable notice to quit, he was unable to obtain a decree for ejectment. A Judge, interfering with the discretion exercised by a lower Court in granting a declaratory decree, should state his reasons for so doing. KALI KISHEN TAGORE *v.* GOLAM ALI 3

——————— **Suit for.** *See* MULTIFARIOUSNESS 147

Decree, Construction of. *See* LIMITATION 73

———, **What it includes.** *See* MINOR, SUIT BY 189

——— **in former Suit, Admissibility in Evidence of** *See* RES JUDICATA ... 352

——— **of Appellate Court, Effect of.** *See* BENG. ACT VIII OF 1869, s. 52 ... 13

Decree payable by Instalments. *See* LIMITATION 73

——— **silent as to mesne profits.** *See* POSSESSION, SUIT FOR 283

Denial of Landlord's Title by Tenant. *See* LANDLORD AND TENANT 96

Deposit of Title Deeds. *See* EQUITABLE MORTGAGE 322

Depositions not read over to Accused. *See* DISCHARGE OF ACCUSED 121

Discharge of Accused—*Further enquiry and order of commitment passed simultaneously by Sessions Judge—Depositions not read over to accused—Oral evidence—Statement of Mooktear as to faulty record—Criminal Procedure Code, (Act X of 1882), s. 360—Evidence Act (I of 1872), s. 91*] A Sessions Judge, after hearing a general statement made by a Mooktear engaged in the case, considered that the depositions of certain witnesses taken in the Magistrate's Court did not conform with the requirements of s. 360 of the Code of Criminal Procedure, and refused to admit the depositions as evidence, and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions on behalf of the

Discharge of Accused—*Continued.*

Crown ; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held*, on appeal, that the conviction and sentence must be set aside. ADYAN SING *v.* QUEEN EMPRESS 121

Discretion of Court. *See* DECLARATORY DECREE, SUIT FOR 3

——————————. *See* LIMITATION ACT, s. 5 266

Dispossession of Ijaradar. *See* LIMITATION ACT, 1877, ART. 144 101

Dispute regarding Julkur. *See* CRIMINAL PROCEDURE CODE, s 145 179

Durputnidar, Payment by, to stay Sale. *See* ARREARS OF RENT, SUIT FOR ... 331

Ejectment, Liability to *See* BENGAL ACT VIII OF 1869, s 52 13

——————, **Suit for.** *See* CO-SHARERS 75

——————————. *See* LANDLORD AND TENANT 96, 248

——————————. *See* ONUS PROBANDI 1

——————————. *See* RES JUDICATA 17

Equitable Mortgage—*Deposit of title deeds—Contract of Mortgage—Letter stating terms of Equitable Mortgage, Effect of—Equitable Mortgagee, his proper remedy.*] *A* and *B* executed a joint and several promissory note in favour of the plaintiff. On the same day *A* deposited with the plaintiff the title deeds of his property as collateral security, and received conjointly with *B* a part of the consideration money for the promissory note. Shortly afterwards *A* addressed a letter to the plaintiff to this effect: "As collateral security for the due payment of Rs. 2,000 secured by a promissory note of even date * * I herewith hand you the title deeds of my property * * money borrowed and received in pledge of house," and obtained the balance. In a suit on the basis of the documents for foreclosure or for sale of the property, or in the alternative for a conveyance of the legal estate: *Held*, that the letter itself was not a contract of mortgage, and was without registration admissible in evidence of the equitable mortgage which had been completed upon deposit of title deeds. *Held*, also, that the fact of the letter would not prevent the plaintiff from giving any other evidence in proof of his claim. *Kedar Nath Dutt v. Sham Lall Khettry*, 11 B. L. R., 405, followed. *Held*, further, that the plaintiff was not entitled upon the transaction to a conveyance of the legal estate, his proper remedy being by sale of the mortgaged property. OO NOUNG *v.* MOUNG HTOON OO ... 322

Erroneous Construction of Act. *See* CIVIL PROCEDURE CODE, s. 622 90

"Estate," Meaning of. *See* PUBLIC DEMANDS RECOVERY ACT, ss. 10, 23 ... 208

Estoppel. *See* RES JUDICATA ... 17

Evidence Act (I of 1872), s. 32, cl. 5 and III. (1.)—*Hearsay Evidence—Pedigree, Question of—Proof of birth—Statement of deceased father.*] In a suit on a promissory note, to which the only defence was minority, a statement made by the defendant's father, (who died before proceedings by way of suit had been contemplated) to a witness as to the age of his son, *held* to be inadmissible as evidence of the age of the defendant in support of his defence. BEPIN BEHARY DAW *v.* SREEDAM CHUNDER DEY .. 42

——— **s. 91.** *See* DISCHARGE OF ACCUSED 121

———, **s. 114.** *See* ROAD CESS ACT, ss. 52, 53 197

———, **(I of 1872), s. 154**—*Hostile witness.*] The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence. KALACHAND SIRCAR *v.* QUEEN EMPRESS 53

Exclusion of time between delivery of Judgment and signing Decree. *See* LIMITATION ACT, 1877, s. 12 ... 104

Execution of Decree. *See* FOREIGN COURT, DECREE OF 95

———, *See* LIMITATION 73, 257

——— **for rent.** *See* BENG. ACT VIII OF 1869, s. 52 ... 13

Fabricating Documents, Intention in. *See* FORGERY 349

False Complaint. *See* COMPENSATION... 304

——— **information to Public Servant, Charge of giving.** *See* PENAL CODE, s. 182 270

Final discharge where insolvent is not personally present. *See* INSOLVENCY 67

Fishery, Right of. *See* CRIMINAL PROCEDURE CODE, s. 145 179

Foreclosure, Notice of. *See* MORTGAGE 50

Foreign Court, Decree of—*Execution of decree—Jurisdiction—Court of Cooch Behar, Decree of.*] The Courts of British India have no power to execute a decree passed by the Court of a Foreign State. A decree of the Civil

Foreign Court, Decree of—*Continued.*

Court of Cooch Behar having been transferred for execution to the District of Rungpore: *Held*, that the Courts of Rungpore had no jurisdiction to execute the decree. HUKUM CHAND ASWAL *v.* GYANENDRA CHUNDER LAHIRI 95

Forfeiture. *See* LANDLORD AND TENANT 248

Forgery—*Penal Code, s. 464—Intention in fabricating documents—Fraudulent and dishonest fabrication.*] The accused, who was a copyist in the Sub-divisional Office at *B*, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post and purporting to have been made by the Sub-divisional Officer of *B*, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-divisional Officer at *B*, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-divisional Officer, having some suspicion as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office the accused fabricated a third document, purporting to be a letter from the Sub-divisional Officer to the post master asking him to stop the despatch of the demi-official letter. The accused was charged with, and convicted in the Sessions Court of, the offence of forgery, under s. 464 of the Penal Code, in respect of the three documents. *Held*, the conviction was right with regard to the two first documents, but with regard to the third document it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of that section. ABDUL HAMID *v.* THE EMPRESS ... 349

Fraudulent and Dishonest Fabrication. *See* FORGERY 349

Further inquiry and order of Commitment passed simultaneously by Sessions Judge. *See* DISCHARGE OF ACCUSED 121

General Clauses Act (I of 1868), s. 6. *See* SECOND APPEAL 86

Guardianship, Certificate of. *See* ACT XL OF 1858, s. 3 219

Hearsay Evidence. *See* EVIDENCE ACT, 1872, s. 32 42

High Court as Court of Revision. *See* PRESIDENCY MAGISTRATE ... 272

———, **Power of, on Revision.** *See* CIVIL PROCEDURE CODE, s. 622 ... 90

Hindu Law—*Alienation by Father—Mitakshara and Mithila Law—Execution of decree—Sale of ancestral estate in satisfaction of father's debt—Liability of son's shares—Parties to pro-*

Hindu Law—*Continued.*

ceedings.] There is no conflict of authority as to the principle that sons cannot set up their rights, which are to take present vested interests, on their birth, jointly with their father in ancestral estate, against their father's alienation for an antecedent debt, or against his creditors' remedies for his debt, if such debt has not been contracted for an immoral purpose; the law on this point being the same under Mitakshara and the Mithila shasters. From the above must be distinguished the question how far the joint sons can be precluded from disputing the liability attaching to their shares, where proceedings have been taken by, or against, the father alone. If the father's debt, not having been contracted for an immoral purpose, is such as to support a sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by suit. But the joint sons, not being parties to the execution proceedings or to the sale, are not precluded from having a question as to the nature of the debt tried in a suit of their own; a right which will, however, avail them nothing unless it can be shown that the debt was not such as to justify a sale of the joint estate. If, upon the proceedings and in regard to the intention of the parties doubts are raised whether what has been sold is the interest of the father alone, or the joint estate, the absence of the sons from the proceedings may be a material consideration. But, if the purchaser has bargained and paid for the entirety, he may defend his title upon any ground which would have justified a sale, had the sons been brought in to defend their interests in the execution proceedings. *Deendyal* v. *Jugdeep Narain Singh*, L. R. 4 I. A., 247; I. L. R., 3 Calc., 198, does not lay down as an invariable rule that co-parcenary interests will not pass by an execution sale unless the co-parceners are joined in the suit, or that only the father's interest passes to the purchaser where the suit was against the father alone. This debt being one which must be taken as a joint family debt, though the suit upon it was against the father alone, *held*, that a claim by minor sons for exemption of their shares failed on the merits, the entire family estate having passed by the sale. NANOMI BABUASIN *v.* MODHUN MOHUN 21

——— *Maintenance—Maintenance of mother on partition between her son and step-sons.*] A widowed mother on a partition taking place between her son and her step-sons, of the property left by her husband, is not entitled to have the whole property charged with her maintenance, but only that portion of it which is allotted to her son on the partition. A separation in food and worship took place between a Hindu widow, her son and her two step-sons, after which the widow lived as a member of her son's family, and was maintained by him. A partition of the moveable property having been made, a suit was brought by the son against the step-sons for partition of the immoveable property, and a decree was made defining the shares of the parties therein. That suit was brought and decreed pending a suit by the widow against her son and step-sons for maintenance from the date of the separation, and for fixing her future maintenance, in which suit she sought to have the maintenance charged on the whole estate left by her husband. *Held*, that from the separation to the decree in the partition suit, the widow was entitled to maintenance charged on the whole estate; and subsequently to the decree to a charge on her son's share only. But inasmuch as she had during the former period been maintained by her son, and could not claim maintenance over again from her step-sons, whatever claim her son might have against them for contribution for her maintenance during that time, the suit as against them must be dismissed. Where the annual value of the whole estate was found to be Rs. 70,000, and the proportionate annual value of her son's portion was Rs. 23,333, Rs. 150 a month was held under the circumstances to be a suitable maintenance. KEDAR NATH COONDOO CHOWDHRY *v.* HEMANGINI DASSI ... 336

——— *Partition—Widow's Share.*] The plaintiff, the widow and heiress of one *N*, brought a suit for partition of the estate of one *R* (her late husband's father) against *A*, a son of her late husband's half-brother, and *K* the widow of *R*, the parties to the suit being the only members of the family then alive. *Held*, that *A* took a one-half share in the estate, the other half share being divisible between the widow of *R* and the widow of *N*. *Cali Churn Mullick* v. *Janova Dossee*, I Ind. Jur., N. S., 284, followed. KRISTO BHABINEY DOSSEE *v.* ASHUTOSH BOSU MULLICK 39

———. *See* POSSESSION, SUIT FOR 283

——— **Wife, Purchase in name of.** *See* BENAMI TRANSACTION 181

Hostile Witness. *See* EVIDENCE ACT, 1872, S. 154 53

Ijaradar, Dispossession of. *See* LIMITATION ACT, 1877, ART. 144 ... 101

Immoveable Property, Sale of, by person out of possession. *See* TRANSFER OF PROPERTY ACT, SS. 52, 135 ... 297

Incumbrances. *See* ONUS PROBANDI ... 1

Infant. *See* INSOLVENCY 68

Insolvency—*Final discharge where insolvent is not personally present in Court—Affidavit explaining absence—Opposition to final discharge.*] An insolvent who has obtained a rule *nisi* for his final

Insolvency—*Continued.*

discharge, but who is not personally present in Court on the return of the rule, is entitled, where no one appears to oppose the rule, to have the rule made absolute on his putting in a sufficient affidavit explaining his absence. IN RE J. W. FOX 67

———*Infant—Minor—Trading contract—Insolvent Act* (11 & 12 *Vict., c.* 21.) A minor who has traded cannot be adjudicated an insolvent on the petition of the persons who have supplied him with funds for the purposes of his business. IN THE MATTER OF NOBODEEP CHUNDER SHAW 68

———*Interest on scheduled debts—Official Assignee's Commission on interest.*] Where an insolvent's estate is sufficient to pay off his creditors in full, leaving a balance in the hands of the Official Assignee, the Court will direct interest at 6 per cent. to be paid, on such proved or admitted contract debts as expressly or impliedly carry interest, as from the date of the filing of the petition in insolvency; and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands to be made over to the insolvent. IN RE MAHOMED MAHMUD SHAH 66

Insolvent Act (11 & 12 Vict., c. 21). *See* INSOLVENCY 68

Instalments, Decree payable by. *See* LIMITATION 73

Intention in fabricating Documents. *See* FORGERY 349

Interest on Scheduled Debts. *See* INSOLVENCY 66

———*Bond—Penalty—Contract Act, s.* 74—*Act XXVIII of* 1855, *s.* 2.] The stipulation in a bond was in these terms: "I cannot pay Rs. 1,000 now, so I will pay it within two months and 15 days; if I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month": *Held*, that the stipulation was one for the payment of interest within the meaning of s. 2, Act XXVIII of 1855, and did not fall under s. 74 of the Contract Act. *Mackintosh* v. *Crow*, I. L. R., 9 Calc., 689, approved; *Balkishen Das* v. *Run Bahadur Singh*, I. L. R., 10 Calc., 305, considered. ARJAN BIBI *v.* ASGAR ALI CHOWDHURI ... 200

Interest—*Interest at increased rate—Penalty—Contract Act, ss.* 60, 74—*Appropriation of payments.*] In consideration of an advance of Rs. 118, the defendants executed in favour of the plaintiff a mortgage bond, dated 3rd November 1879, by which it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first class rates; and in case the same is not paid in kind, it will be paid principal with interest from the date of execution at one anna per cent. per mensem in cash in the month of Baisakh 1287 F.S. (April 1880)." The defendants admitted execution of the bond, and pleaded payments in grain to the amount of Rs. 136, which they failed to prove. It was found that the plaintiff had received payments in grain to the extent of Rs. 71, more than half of which, however, he claimed to be entitled to appropriate to the payment of other antecedent debts which were due to him by the defendants. It was not stated at the time of payment towards which debt the payments were to be applied; but all the payments were admittedly made in kind. *Held*, that the plaintiff was not entitled to appropriate the payments to the antecedent debts, inasmuch as, within the meaning of s. 60 of the Contract Act, there were "other circumstances" indicating that the payments were made in liquidation of the amount of the bond. *Held*, also, that the increased rate of interest being made payable from the date of the bond, and not only from the breach of the contract, must be taken to be in the nature of a penalty and only to be taken into consideration as a basis upon which damages for the breach of contract were to be estimated. The principle on this subject laid down in the case of *Mackintosh* v. *Crow*, I. L. R., 9 Calc., 689, approved of. SUNGUT LAL *v.* BAIJNATH ROY 164

Interpleader Suit, Application to be made a party to. *See* CIVIL PROCEDURE CODE, s. 622 90

Joint Wrong-Doers. *See* RIGHT OF SUIT 300

Judgment—*Form and contents of judgment—Criminal Appeal to Magistrate—Criminal Procedure Code,* 1882, *ss.* 367, 424.] A Magistrate, after hearing an appeal from the Deputy Magistrate, gave the following judgment: "I see no reason to distrust the finding of the lower Court. The sentence passed however appears harsh. I reduce the term of imprisonment to fifteen days. The fines and terms of imprisonment in default will stand." *Held*, following the decision in *Kamruddin Dai* v. *Sonaton Mandal*, I. L. R., 11 Calc., 449, that it was not a judgment within the meaning of ss. 367 and 424 of the Criminal Procedure Code. IN THE MATTER OF THE PETITION OF RAM DAS MAGHI 110

Julkur Right. *See* CRIMINAL PROCEDURE CODE, s. 145 179

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———. *See* SMALL CAUSE COURT PRESIDENCY TOWNS ACT, 1882, s. 18 ... 37

———. *See* VALUATION OF SUIT ... 255

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Landlord and Tenant. *See* DECLARATORY DECREE, SUIT FOR 3

———————. *See* RES JUDICATA 17

———————*Suit for ejectment—Cause of action—Landlords' title, Denial of—Written statement.*] *P* and *R* brought a suit for ejectment on the allegation that their tenants had failed to come to a settlement in respect of a certain *jote*, and that a notice to quit had thereupon been served on them. The defendants (tenants) in their written statement denied the landlords' title. The lower Courts found that the *jote* belonged to the plaintiffs, and the defendants had been and still were in possession of the same as tenants; but dismissed the suit on the ground that the service of notice had not been proved. *Held* (on second appeal) that, inasmuch as the cause of action must be based on something that accrued antecedent to the suit, the denial by the defendants of their landlords' title in the written statement would not entitle the plaintiffs to a decree on the ground of forfeiture. PRANNATH SHAHA *v.* MADHU KHULU ... 96

———————*Suit for ejectment—Repudiation of Title—Setting up different tenure from that alleged by Landlord—Forfeiture.*] The plaintiff in 1870 brought a suit for rent, in which the defendant set up and filed a permanent *howladari* lease, but admitted that he held at the rent alleged by the plaintiff, and that suit was decreed, the Court thinking it unnecessary to decide the question of the validity of the tenure set up by the defendant. In a suit brought after a notice to quit, which was found to be invalid, to eject the defendant, and for a declaration that he had no such permanent *howladari* tenure as he alleged, the defendant again set up the *howladari* lease under which he admitted he had paid a fixed rent to the plaintiff. *Held*, that though the defendant repudiated the particular holding which the plaintiff attributed to him, he did not question the plaintiff's right to receive the rent, and therefore did not in any sense repudiate his landlord's title. What he did amounted merely to questioning the right of the landlord to enhance the rent, which was not such a disclaimer as would result in law in a forfeiture of his tenure. The plaintiff therefore was not entitled to eject the defendant without giving him a proper notice to quit. *Vivian v. Moat*, L. R., 16 Ch., 730, distinguished, on the ground that the principle on which it is based is wholly inapplicable in Bengal—*Baba v. Vishvanath Joshi*, I. L. R., 8 Bom., 228, dissented from. KALI KRISHNA TAGORE *v.* GOLAM ALLY 248

Land Acquisition Act. *See* BENGAL MUNICIPAL ACT, s. 32 171

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Liability of son's shares for father's debt. *See* HINDU LAW, ALIENATION BY FATHER 21

Limitation. *See* ACT XL OF 1858, s. 3 219

———————*Execution of Decree—Decree payable by Instalments—Option to execute—Waiver—Construction of Decree.*] Where a decree is made payable by instalments, and contains a provision that, on failure of any one instalment, the whole is to become due, the question whether the decree-holder may waive the benefit of the provision or must execute his decree within three years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case. On an application for execution of a decree made payable by instalments, *held*, that the application was barred by limitation, on the ground that the judgment-creditor should have applied for execution within three years from the date of the first default in payment. JUDHISTIR PATRO *v.* NOBIN CHUNDER KHELA 73

———————*Execution of Decree—Jurisdiction of Court where decree was passed—Transfer of decree for execution—Code of Civil Procedure, ss.* 223, 239, 248.] On the 4th of March 1884, a decree-holder applied to the Court of the Subordinate Judge of Moorshedabad (where the decree was passed) for transfer of the decree to the District Court of Beerbhoom for execution. The transfer was made, and, on application by the decree-holder, the judgment-debtor's properties in Beerbhoom were attached. Thereupon the judgment-debtor objected to the attachment, and obtained an order under s. 239 of the Code of Civil Procedure, staying the execution proceedings. The judgment-debtor then applied to the Court of the Subordinate Judge at Moorshedabad objecting to the execution of the decree on the ground that it was barred by limitation. The objection was overruled by the Subordinate Judge, and his decision was upheld on appeal to the District Judge. On second appeal to the High Court: *Held*, that the Moorshedabad Court was competent to hear and determine the plea of limitation. *Held*, also, that the fact of the judgment-debtor's not raising the plea of limitation in the Beerbhoom Court did not, under the circumstances, preclude him from relying on it in his subsequent application to the Court at Moorshedabad. SRIHARRY MUNDUL *v.* MURARI CHOWDHRY 257

Limitation Act, 1871, Art. 129—*Meaning of "suit to set aside adoption."*] Art. 129 of Sch. II of Act IX of 1871, the Indian Limitation Act of that year, using the expression "suit to set aside an adoption," denoted a suit bringing the validity of an adoption into question; and the rule of limitation, given by that Article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption in virtue of which the opposite party was in possession. The plaintiffs, as collateral heirs of a childless Hindu, questioned the adoptions purporting to have been made by his widows, in pursuance of authority from him; such adoptions having been followed by continuous possession, and having recognised in formal instruments, proceedings, and decrees to which the plaintiffs were parties. *Held*, on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under Art. 129 of Sch. II of Act IX of 1871. Part of the language of the judgment in *Raja Bahadur Singh* v. *Achumbit Lall*, L. R., 6 Ind. Ap., 110, referred to, and that case, in which the plaintiffs' claim was not affected by the widow's adoption, distinguished from the present. JAGADAMBA CHOWDHRANI *v.* DAKHINA MOHUN ROY CHAODHRI. SARODA MOHUN ROY CHAODHRI *v.* DAKHINA MOHUN ROY CHAODHRI 308

——— **1877, s. 5**—*Discretion of Court—Appeal out of time, Admission of.*] Section 5 of the Limitation Act gives a discretion to a Court to admit an appeal filed out of time. *A* valued his suit at Rs. 18,000 which was reduced to less than Rs. 5,000 by the Court of first instance at Rajshahye. A decree, dated the 20th December 1883, was given against the defendant, who applied for copies on the 3rd of February, and the decree was ready on the 7th. The defendant was apparently under the impression that the appeal would lie to the High Court; but on the 16th of March a letter was despatched by his Calcutta agent informing him that he was mistaken,—and that the appeal lay to the District Judge. This letter reached Rajshahye on the 17th, and the appeal was filed on the 23rd of March. *Held*, that under the circumstances the Court might admit the appeal in the exercise of its discretion under s. 5 of the Limitation Act. HURO CHUNDER ROY *v.* SURNAMOYI ... 266

———, **s. 5**—*"Sufficient cause"—Admission of review after time.*] *Per Curiam.—Held* on the facts, that there was no "sufficient cause" for not making an application for review within the time limited by s. 5 of the Limitation Act, 1877. GOPAL CHUNDRA LAHIRI *v.* SOLOMON 62

——— **s. 5**—*Sufficient cause—Poverty—Admission of appeal after time.*]

Limitation Act, 1877—*Continued.*

Poverty is not "sufficient cause," within the meaning of s. 5 of the Limitation Act, Act XV of 1877, for admitting an appeal after the ordinary period of limitation prescribed therefor has expired. MOSHAULAH *v.* AHMEDULLAH 78

——— **s. 12, Sch II, Art. 152**—*Exclusion of time between delivery of judgment and signing decree—Civil Procedure Code, (Act XIV of 1882), s. 205—Time for obtaining copy of decree.*] Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under s. 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal. BANI MADHUB MITTER *v.* MATUNGINI DASSI. KALI SHUNKER DASS *v.* GOPAL CHUNDER DUTT ... 104

——— **s. 19**—*Acknowledgment of debt—Secondary Evidence of Acknowledgment—Authority to bind Minor by Acknowledgment.*] An original account book containing an acknowledgment of a debt had been filed in Court, and subsequently lost whilst in Court; *held*, that secondary evidence of such acknowledgment might be given, notwithstanding the words of s. 19 of the Limitation Act. A person merely by reason of being the mother and guardian of a minor has no authority to make an acknowledgment of a debt on behalf of the minor so as to give a creditor a fresh start for the period of limitation. WAJIBUN *v.* KADIR BUKSH 292

——— **Art. 13**—*Suit for refund of sale proceeds paid in accordance with order for distribution under s. 295, Civil Procedure Code, 1882—Multifariousness.*] In execution of a decree against six persons the plaintiffs had certain property brought to sale, the proceeds of which were brought into Court. The defendants, who held five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, applied to have the amount in Court rateably distributed; and in accordance with an order of the Court, dated 13th September 1880, this was done, the proceeds being distributed in proportion to the amounts of the decrees. In a suit brought on 24th August 1883 against the defendants, on the allegation that the plaintiffs were entitled to the whole of the proceeds, or in the alternative for distribution on a different principle: *Held* the suit was one to set aside the order, and not having been brought within one year from the date of the order was barred by limitation under Art. 13, Sch. II of Act XV of 1877. *Ram Kishan* v. *Bhawani Das*, I. L. R., 1 All., 333, distinguished. *Held*, also, that there was no misjoinder of causes of action by reason of all the defendants being included in one suit. GOUR PROSAD KUNDU *v.* RAM RATAN SIRCAR ... 159

Limitation Act, 1877, Sch II, Arts. 61, 115, 120—*Money which plaintiff was obliged to pay in consequence of acts of defendants.*] On the 29th May 1873 one *T* drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person his heirs sued the shroff to recover the sum deposited, and on the 30th January 1878 obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February 1884 the shroff sued *T*, the heirs of the third party and another person (who owned to having received some of the money from *T*), to recover the sum he had been compelled to pay under the decree of 1878. *Held*, that the plaintiff's cause of action arose at the time when he actually paid down the money on the 15th January 1883, and that the suit therefore was not barred by limitation TORAB ALI KHAN *v.* NILRUTTUN LAL ... 155

——————— **Art 144**—*Ijardar, Dispossession of—Adverse possession—Zemindar, Suit by.*] Possession taken by a trespasser during the currency of an *ijara* lease does not become adverse to the zemindar (lessor) until upon the expiration of the term, and a suit for possession may be brought within 12 years of that date under the provisions of Art. 144 of the Limitation Act. *Krishna Gobind Dhur* v. *Hari Churn Dhur*, I. L. R., 9 Calc., 367, followed. SHARAT SUNDARI DABIA *v.* BHOBO PERSHAD KHAN CHOWDHURI 101

——————— *Suit for possession.*] On the 7th December 1863, *A* in execution of his decree purchased and obtained symbolical possession of a certain 4-annas share, the property of his judgment-debtor. The 4-annas share was at the time under a mortgage to *B*, who happened to be in possession of the share as lessee. The term of the lease expired in 1870 or 1871. *A*, *C* and *D*, who were members of a Hindu joint family, afterwards came to a partition of the common estate in which was included the 4-annas share, and one of them, *D*, sold his share in the 4-annas to *B*, who, on the 22nd December 1871, purchased it in the name of *E*. *B* then brought a suit to enforce his mortgage against *F*, the heir of his mortgagor, and on the 8th December 1873 obtained a decree which on special appeal was confirmed by the High Court on the 21st December 1875. On the 6th December 1875 *A*, *C* and *E* had brought a suit for the possession of the 4-annas share against one Mukund Kishore, who had wrongfully taken possession of the property in 1870 or 1871, soon after the expiration of the lease to *B*. The suit was finally decided in their favour on the 29th July 1879. In the meantime, that is somewhere in 1876, *B* had contrived to take possession of the whole share. In 1883 symbolical possession was obtained under the decree of the 29th July. *B* then executed his mortgage decree, and attached the 4-annas share, excluding the portion which stood in the name of his benamidar. *Z*, the heir of *A*, having failed to make good his claim to a share of the property in the execution proceedings, now brought a suit for possession against *B* on the 19th July 1884. *Held*, that the suit, having been brought within twelve years from the date of the fraudulent possession by *B*, was in time, and fell under Art. 144 of the Limitation Act. RAM KISHORE GANGAPADHYA *v.* BANDIKARATAN TEWARI CHOWDHRY 203

——————— **Art. 152.** *See* LIMITATION ACT, 1877, s. 12 ... 104

——————— **156.** *See* BURMAH COURTS ACT 221

Lunatic—*Act XXXV of 1858, s. 9—Court of Wards in Oudh—Power to lease lands of proprietor disqualified from lunacy.*] The order of a Civil Court declaring, under Act XXXV of 1858, an Oudh talukdar to be of unsound mind and incapable of managing his affairs, renders him a disqualified proprietor within the meaning of s. 9 of that Act, with the result that the Court of Wards is authorized to take charge of his estate without a further order of the Civil Court appointing the Court of Wards to be manager. A Civil Court having made an order declaring a talukdar to be of unsound mind and incapable of managing his affairs, and having at the same time appointed to be manager of his estate the Deputy Commissioner of the District, who also acted as manager of the Court of Wards: *Held*, that a lease for more than five years made by the latter officer, as representing the Court of Wards, was not invalidated under s. 14 of the above Act, providing that no manager, appointed by the Civil Court under it, shall have power to grant a lease for any period exceeding five years. SARABJIT SINGH *v.* CHAPMAN ... 81

Magistrate, Appeal to, in Criminal Case. *See* JUDGMENT 110

——————, **Jurisdiction of**—*Powers of Second Class Magistrate—Reference to District Magistrate—Committal to Court of Sessions—Criminal Procedure Code, s. 239.*] An Assistant Magistrate convicted a person under ss. 406 and 417 of the Penal Code, and referred the case to the District Magistrate for sentence under the provisions of s. 349 of the Code of Criminal Procedure. The District Magistrate was of opinion that the offence was one properly punishable under s. 420 of the Penal Code, and one which the Assistant Magistrate had no jurisdiction to deal with, and that therefore the reference undes s. 349 was *ultra vires* and illegal. On a reference to the High Court: *Held*, that the Assistant Magistrate was not wholly without jurisdiction as he was competent to commit the accused to the Court of Sessions, though not to hold a trial, and that the District Magistrate

Magistrate, Jurisdiction of—*Continued.*

might, if he thought proper, commit the accused to the Court of Sessions. ABDUL WAHAB *v.* CHANDIA 305

——————, **Power of.** *See* CRIMINAL PROCEDURE CODE, ss. 191, 202, 203 ... 334

Maintenance. *See* HINDU LAW, MAINTENANCE 336

Master and Servant—*Monthly service—Wrongful leaving of employment, Consequence of—Right to Wages.*] When a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all rights to wages for the time he had actually served during that month. DHUMEE BEHARA *v.* SEVENOAKS ... 80

Material irregularity affecting merits of Case. *See* CIVIL PROCEDURE CODE, s. 622 225

Measurement of Waste Lands. *See* BENGAL ACT VIII OF 1869, s. 38 ... 57

Mesne Profits. *See* POSSESSION, SUIT FOR. 283

Minor. *See* INSOLVENCY 68

——— **Authority to bind Minor by acknowledgment.** *See* LIMITATION ACT, s. 19 292

———. **Suit by**—*Minority, Objection on the ground of—Remand—Rejection of plaint—Civil Procedure Code, ss. 2, 53, 54, 442—Decree, What it includes.*] Section 442 of the Civil Procedure Code refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor. Where in a suit the plaintiffs described themselves as adults, and on the objection of the defendants an issue was raised and inquired into on the question of age: *Held*, that the order passed under the circumstances, although it professed to have been made under s. 442 of the Procedure Code, must be treated as one rejecting the plaint or dismissing the suit on the ground that the suit was instituted by persons who were established on the evidence to be minors, and was appealable as a decree within the meaning of s. 2 of the Code. The words, "rejecting the plaint," in s. 2, are not limited to the cases provided for in ss. 53, 54. *Held*, also, that the defendant, not having taken an objection to the suit on the ground of the minority of the plaintiffs, whilst it was pending in appeal to the High Court, were precluded from raising it on remand. BENI RAM BHUTT *v.* RAM LAL DHUKRI 189

Misjoinder of Causes of Action. *See* MULTIFARIOUSNESS 147

Mistake of Counsel. *See* REVIEW ... 62

Mitakshara and Mithila Law. *See* HINDU LAW, ALIENATION BY FATHER ... 21

Modification of Terms of Compromise. *See* COMPROMISE OF SUIT 170

Money which plaintiff had to pay in consequence of defendant's acts. *See* LIMITATION ACT, ARTS. 61, 115, 120 155

Monthly Service. *See* MASTER AND SERVANT 80

Mooktear, Statement of, as to Faulty Record. *See* DISCHARGE OF ACCUSED 121

Mortgage. *See* EQUITABLE MORTGAGE ... 322

————*Foreclosure—Notice of foreclosure—Regulation XVII of* 1806.] A notice of foreclosure signed by the Sherishtadar of the Judge's Court and bearing the seal of the Court, but not the signature of the Judge, *held*, following the principle of the decision in *Basdeo Singh* v. *Mata Din*, I. L. R., 4 All., 276, not to be a valid notice under Regulation XVII of 1806, s. 8. DOMA SAHU *v.* NATHAI KHAN 50

———— *Mortgage of Crops that may be grown upon a certain plot of land, its nature and effect—Transfer of Property Act—Contract Act.*] The mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction. The transaction is neither governed by the Transfer of Property Act nor by the Contract Act; but it is in the nature of an agreement to mortgage moveable property that may come into existence in future. MISRI LAL *v.* MOZHAR HOSSAIN 262

———— **of future Crops.** *See* MORTGAGE 262

Mortgagee. *See* CIVIL PROCEDURE CODE, 1882, s. 311 346

Mortgagor and Mortgagee. *See* REGISTRATION 70

Mother's share on partition between son and step-son. *See* HINDU LAW, MAINTENANCE 336

Multifariousness. *See* LIMITATION ACT, ART. 13 159

———— *Misjoinder of causes of action—Civil Procedure Code*, 1882, s. 28—*Suit for declaratory decree—Specific Relief Act (I of* 1877), s. 42.] The plaintiffs having obtained a decree for the possession of certain lands and having received formal possession thereof, brought a suit against 86 persons holding distinct and separate tenures in those lands, on the allegations that, "on the plaintiffs attempting to measure the lands, and calling on the tenants to pay rent, ten of the defendants described as *prodhans* or headmen formed a combination and gained over the other defendants with a view to injure the plaintiffs; that through their help and endeavour the remaining defendants fai[illegible] to recognize the plaintiffs as landlords, and [illegible]clined to pay any rent or to allow them to [illegible]sure the lands, driving away an Amin who [illegible] to measure the lands on behalf of the pl[illegible] and thereby preventing the plaintiffs fr[illegible]cising their proprietary rights; that t[illegible]tiffs brought suits for rent against so[illegible]

Multifariousness—*Continued.*

defendants, and in those suits the defendants denied the plaintiffs' title as landlords, whereupon the plaintiffs, seeing the necessity of instituting a suit for declaring the defendants tenants of the land, withdrew the suits for rent." They stated their cause of action to "be the defendants' act of not recognizing us as their landlords and thereby preventing us exercising our proprietary rights in respect of the land in suit, and not allowing us to make a measurement of that land, and also withholding the payment of rent;" and prayed for a decree establishing their proprietary right and declaring the defendants to be their tenants. *Held*, that there was but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property they had purchased; and that the suit was not multifarious within s. 28 of the Civil Procedure Code. *Held*, also, that the declaratory decree prayed for could be made notwithstanding the plaintiffs might have asked for possession of the lands. LOKE NOTH SURMA *v.* KESHAB RAM DOSS 147

Municipal Corporation. *See* BENGAL MUNICIPAL ACT, s. 32 171

Notice. *See* REGISTRATION 70

——— **of foreclosure.** *See* MORTGAGE... 50

——— **to quit.** *See* CO-SHARERS ... 75

———, **Failure to prove.** *See* DECLARATORY DECREE, SUIT FOR ... 3

Nuisance. *See* CRIMINAL PROCEDURE CODE, s. 133 275

Objection on ground of Minority. *See* MINOR, SUIT BY 189

Obstruction, Removal of. *See* CRIMINAL PROCEDURE CODE, s. 133 275

Official Assignee's Commission on Interest. *See* INSOLVENCY 66

Onus of Proof after acceptance of Goods following examination by purchaser. *See* CONTRACT, BREACH OF 237

——— **Probandi**—*Ejectment, Suit for—Sale for arrears of rent—Avoidance of under-tenure—Incumbrances—Bengal Act VIII of* 1869, *ss.* 59, 60, 66.] In a suit by the purchaser of an under-tenure, under ss. 59 and 60 of the Rent Act (Bengal Act VIII of 1869), to obtain possession of lands held by the defendant, on the ground that the holdings are incumbrances which have [illegible]crued thereon by an authorized act of the [illegible]ious holder of the under-tenure, it lies [illegible] the plaintiff to show that the defendant's [illegible]gs are such incumbrances as the plaintiff [illegible]ed to avoid under s. 66 of the Rent Act. [illegible] NATH SHAHA CHOWDHURI *v.* G. M. [illegible] 1

[illegible]**n to final discharge.** *See* INSOL- [illegible] ... 67

Oral Evidence. *See* DISCHARGE OF ACCUSED 121

Order, Ex parte. *See* APPEAL ... 78

Order refusing Application by Decree-holder for leave to bid. *See* APPEAL 174

——— **rejecting Application to be made a party.** *See* APPEAL 100

Parties—*Civil Procedure Code*, s. 32—*Power of Court to add party.*] A Court may, in the exercise of its discretion under s. 32 of the Civil Procedure Code, add a party to a suit upon his own application. RABBABA KHANUM *v.* NOOR-JEHAN BEGUM *alias* DALIM SHAHIBA ... 90

Partition. *See* HINDU LAW, PARTITION

———**between sons and step-sons.** *See* HINDU LAW, MAINTENANCE ... 336

Party, Order rejecting Application to be made a. *See* APPEAL 100

———**to Execution Proceedings.** *See* CIVIL PROCEDURE CODE, 1882, s. 244 ... 326

Payment to stay sale. *See* ARREARS OF RENT, SUIT FOR 331

Pedigree, Question of. *See* EVIDENCE ACT, 1872, s. 32 42

Penalty. *See* INTEREST ... 164, 200

Penal Code, s. 182—*False information to a Public servant, Charge of—Criminal Procedure Code, s.* 195—*Sanction to prosecution—Separate convictions, for one statement, Illegality of.*] An information was given to a police officer in the course of which two persons were named in whose houses stolen property belonging to a certain individual would be discovered: on complaint the information was found to be false, and the accused was convicted and punished for two offences under s. 182 as affecting two different persons. *Held*, that although the information related to two different persons the accused could be charged with having made only one false statement, and punished for one offence under s. 182. Section 195, Criminal Procedure Code, clearly shows that a complaint directly made by a public servant mentioned therein is quite as sufficient as his sanction. *Empress of India* v. *Radha Kishan*, I. L. R., 5 All., 36, dissented from. POONIT SINGH *v.* MADHO BHOT 270

———, **s. 183.** *See* CRIMINAL PROCEDURE CODE, s. 145 175

———, **s. 464.** *See* FORGERY ... 349

"Person whose property has been sold." *See* CIVIL PROCEDURE CODE, 1882, s. 311 346

Plaint, Rejection of. *See* MINOR, SUIT BY 189

Possession, Evidence of. *See* BOUNDARY DISPUTE 280

Possession, Parties to Inquiry as to. *See* CRIMINAL PROCEDURE CODE, s. 145 175

——, **Suit for.** *See* LIMITATION ACT, 1877, ART. 144 203

——*Mesne profits—Decree silent as to mesne profits—Power of Court executing Decree—Hindu Law—Daughters' sons—Representative—Reversioners, Liability of, for acts of Widow.*] Plaintiff sued for possession of certain lands and for mesne profits. He obtained a decree for possession, but the decree was silent as to mesne profits. *Held*, that the Court executing the decree was not competent to entertain a claim for mesne profits made by the decree-holder. A Hindu, governed by the Bengal School of Hindu Law, brought a suit for possession of a certain taluk, but died before decree, leaving him surviving a widow and two daughters. The widow was substituted in the suit instead of her husband, and she obtained a decree for possession. By a summary order made in execution of the decree the widow was put in possession of the taluk as well as of certain lands, which lands were claimed by a person not a party to the suit, as lands not belonging to the taluk. The claimant afterwards brought a suit for these lands against the widow. The widow died during the suit, and was succeeded by her daughters, who also died after a decree for possession of the lands had been obtained by the claimant against them, when their sons were substituted in their stead as defendants. It appeared that the widow, the daughters and the daughters' sons had all been in possession of the disputed lands as a portion of the family estate. *Held*, that the reversioners, the daughters' sons, were liable as the legal representatives of the daughters, and as such were liable for all costs incurred in the suit brought by the claimant for possession of the disputed lands. CHUNDER COOMAR ROY *v.* GONESH CHUNDER DASS 283

Poverty. *See* LIMITATION ACT, 1877, s. 5 78

Pre-emption, Suit for. *See* VALUATION OF SUIT 255

Presidency Magistrate—*Summary trial—Conviction in non-appealable case—High Court as a Court of Revision—Code of Criminal Procedure, ss.* 370, 437.] In every case which is not appealable to the High Court, a Presidency Magistrate should state his reasons for convicting the prisoner, so that the High Court may judge as to whether there were sufficient materials before the Magistrate to support the conviction. In a case where the accused was convicted of theft and sentenced to six months' rigorous imprisonment, the notes of the evidence taken by the Magistrate did not afford sufficient materials upon which the prisoner could be legally convicted, and the Magistrate had omitted to record his reasons for the conviction under s. 370, cl. (i) of the Code of Criminal Procedure. *Held*, by the High Court as a Court of Revision, that the conviction and sentence must be set aside, notwithstanding the provisions of s. 437 of the Code of Criminal Procedure. IN THE MATTER OF THE PETITION OF YACOOB. YACOOB *v.* ADAMSON. 272

Presidency Magistrate—*Continued.*

Presumption. *See* ROAD CESS ACT, ss. 52, 53 197

Priority. *See* REGISTRATION ... 70

Proceedings. *See* SECOND APPEAL ... 86

Proprietor disqualified, Power to lease Lands of. *See* LUNATIC ... 81

Public Demands Recovery Act—(*Beng. Act VII of* 1880), *ss.* 10, 23—*Attachment under certificate procedure—"Estate," Meaning of—Act XI of* 1859, *ss.* 5, 6—*Notification of Sale, Specification of.*] The certificate and notice referred to in s. 10, Beng. Act VIII of 1880, are executive acts, and an attachment, which is the result of those acts, is not a judicial, but an executive proceeding. The meaning of s. 23 of that Act, which lays down that a Collector "in the discharge of his functions shall be deemed to be a person acting judicially within the meaning of Act XVIII of 1850," is, that for the purpose of protecting him from personal liability his action is to be regarded as judicial. Under s. 6 of Act XI of 1859, it is not necessary that a notification should specify the owners of an estate or the owners of shares in the estate. *Secretary of State, &c.* v. *Rashbehary Mookerjee*, I. L. R., 9 Calc., 591, followed. All that is necessary under that section is that the notification should specify the estate or shares in the estate to be sold, and in selling a share in an estate it is unnecessary to specify the shares or mouzahs of which that share is composed. The word "estate," as there used, ordinarily means "mehal;" but the term also applies to a portion of a mehal with regard to which a separate account has been opened, but not to an undivided portion of a mehal as to which separate accounts are not kept. RAM NARAIN KOER *v.* MAHABIR PERSHAD SINGH 208

Public Servant, Disobedience to order of. *See* CRIMINAL PROCEDURE CODE, s. 145 175

——, **False information to, charge of giving.** *See* PENAL CODE, s. 182 270

——**Way.** *See* CRIMINAL PROCEDURE CODE s. 133 275

Purchase in name of Hindu Wife. *See* BENAMI TRANSACTION 181

Purchase Money, Suit to recover. *See* CIVIL PROCEDURE CODE, 1882, s. 244 326

Purchaser with notice of prior unregistered mortgage. *See* REGISTRATION 70

Rateable Distribution. *See* CIVIL PROCEDURE CODE, s. 295 225

Record of Rights, Non-publication of. *See* SONTHAL PERGUNNAHS SETTLEMENT 245

Recorder of Rangoon, Appeal from. *See* BURMA COURTS ACT, s. 49 ... 232

Reference to District Magistrate. *See* MAGISTRATE, JURISDICTION OF ... 305

Registration—*Notice—Mortgagor and Mortgagee—Unregistered mortgage—Purchaser with notice of prior unregistered mortgage—Priority.*] Where property has been mortgaged by a deed, the registration of which is not compulsory, a subsequent purchaser of the property, who has duly registered his purchase deed, but who has bought with notice of the unregistered mortgage, takes the property subject to that mortgage. ABOOL HOSSEIN *v.* RAGHU NATH SAHU 70

——— **Act (XX of 1866),** s. 17, cl. 4—*Zur-i-peshgi lease—"Leases not exceeding one year," Meaning of.*] Leases which were exempted from the operation of s. 17, cl. 4, Act XX of 1866, were leases the term of which was one year certain. Where a *zur-i-peshgi* lease was granted for one year, but with a stipulation that unless the loan were repaid within that time it should continue in force, *held*, that such a lease came within the words of s. 17, cl. 4, Act XX of 1866, "leases of immoveable property for any term exceeding one year" of which registration was compulsory. BHOBANI MAHTO *v.* SHIBNATH PARA 113

——— **, ss. 73, 76 and 77**—*Suit for registration of document.*] An application having been made under s. 73 of the Registration Act, the Registrar passed the following order: "All the parties have not appeared, the appeal is struck off. It, however, seems to me that the order of the Sub-Registrar was quite correct." *Held*, that the mere fact of the applicant not having adduced any evidence before the Registrar did not make his order one not refusing registration within the meaning of s. 76; nor was the applicant precluded on that ground alone from pursuing his remedy under s. 77 by a civil suit. SAJIBULLAH SIRKAR *v.* HAZI KHOSH MOHAMED SIRKAR ... 264

Regulation XVII of 1806. *See* MORTGAGE 50

——— **VIII of 1819.** *See* ARREARS OF RENT, SUIT FOR 331

——— **III, of 1872, ss. 24, 25.** *See* SONTHAL PERGUNNAHS SETTLEMENT 245

Remand. *See* MINOR, SUIT BY ... 189

Repeal, Effect of. *See* SECOND APPEAL... 86

Repudiation of Title. *See* LANDLORD AND TENANT 248

Res Judicata—*Admissibility in evidence of decree in former suit.*] The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by the defendants. The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against the same defendants for the rent of the same tenures, and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession and were liable to pay to the then plaintiff his share of the rent. *Held*, (MITTER, J., dissenting) that the decree in the former suit was not a *res judicata* or even admissible as evidence in the present suit. SURENDER NATH PAL CHOWDHRY *v.* BROJO NATH PAL CHOWDHRY ... 352

——— *Landlord and tenant—Suit for ejectment—Issue previously heard and determined—Estoppel—Civil Procedure Code, s. 13.*] In a suit by a landlord against his tenant for ejectment, the defences were (1) no notice to quit had been served; and (2) the tenure was a permanent one. The suit was dismissed on the first ground, the Court holding at the same time that the tenure was not a permanent one. In a subsequent suit for ejectment from the same holding, brought by the same plaintiff against the same defendant, the defences were: (1) the tenure was permanent; and (2) the plaintiff was estopped by the conduct of his predecessor in title from asserting as against the defendant that the tenure was not a permanent one. The lower Appellate Court found the question of estoppel in favour of the defendant, and dismissed the suit. On appeal to the High Court, *Held*, that the decision was right, and must be affirmed. *Semble*, that where a former suit between the same parties in respect of the same subject matter has been dismissed on a preliminary point, a finding in that suit on the merits in the plaintiff's favour will not bar the defendant from putting forward the same defence on the merits in a subsequent suit by the same plaintiff against the same defendant. *Semble*, that the case of *Niamut Khan* v. *Phadu Buldia*, I. L. R., 6 Calc., 319, has been impliedly overruled by the case of *Run Bahadoor Singh* v. *Lucho Koer*, L. R., 12 I. A., 23; I. L. R., 11 Calc., 301. NUNDO LALL BHUTTACHARJEE *v.* BIDHOO MOOKHY DEBEE 17

Restitution of Conjugal Rights. *See* BURMA COURTS ACT, s. 49 ... 232

Reversioners, Liability of, for acts of Widow. *See* POSSESSION, SUIT FOR 283

Review, Admission of, after time. *See* LIMITATION ACT, 1877, s. 5 ... 62

——— *Civil Procedure Code,* 1882, *s.* 624—*Application for review heard by successor to Judge who passed the decree.*] When an application for review is presented to the Judge who

Review—*Continued.*
made the decree, and he thereupon issues notice to the other side, the application is "made" to him within the meaning of s. 624 of the Civil Procedure Code, and may be heard and disposed of by his successor in office. *Karoo Sing* v. *Deo Narain Sing*. I. L. R., 10 Calc., 80, followed. FAZEL BISWAS *v.* JAMADAR SHEIK ... 231

——*Mistake of Counsel—Civil Procedure Code (Act XIV of* 1882), *s.* 623.] *Per* GARTH, C.J.—Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason" in s. 623 of the Civil Procedure Code, yet from the earlier part of the clause it is clear that a point which might have been, but which was not, discovered at the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review. *Per* WILSON, J.—*Semble.*—If at a trial all parties, counsel on both sides, and the Judge, are under a misapprehension as to the contents a document. or, even if the Judge alone misled on such a point, and in consequence a wrong decree is made, the mistake ought to be corrected on review. GOPAL CHANDRA LAHIRI *v.* SOLOMON 62

Revision, Power of High Court on. *See* CIVIL PROCEDURE CODE, s. 622 ... 90

——— *See* PRESIDENCY MAGISTRATE ... 272

Right of Suit—*Cause of Action—Contribution, Suit for—Joint wrong-doers—Breach of Covenant—Damages for breach of Contract—Breach of Contract.*] In a suit for damages against *A* and others for breach of a covenant not to open a ferry at a particular place, a decree was obtained against all the defendants. The amount of this decree was levied by execution from *A* alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrong-doers, and that no suit for contribution would lie as between them. On second appeal to the High Court: *Held*, that the rule of law relied on by the Courts below had no application to the circumstances of the present case, and that the plaintiff was entitled to maintain his action. BROJENDRO KUMAR ROY CHOWDHRY *v.* RASH BEHARI ROY CHOWDHRY ... 300

Right of Way. *See* BENGAL MUNICIPAL ACT, s. 32 171

——— *User of twenty years to support servitude—Extent and mode of user—Calcutta Municipal Act (Bengal Act IV of* 1876).] As establishing his right of way over the defendant's passage, the plaintiff relied upon a user of it, several times in the year, for twenty years prior to the defendant's interruption of it, by mehters for the purpose of removing the contents of a cesspool connected with a privy

Right of Way—*Continued.*
belonging to the plaintiffs' house. The facts indicated by way of limit to the user of the passage only showed that it must be a reasonable user for the above purpose. There was no agreement specifying times, or occasions of access, and the inference was that, if the plaintiffs had thought fit to use the passage more frequently than they did, they were at liberty to do so. In and after 1876, instead of the plaintiffs' mehters, those employed by the Municipality came and went upon the passage, not at distant intervals, but daily, the plaintiffs under bye-laws, in conformity with Bengal Act IV of 1876, being bound to give them access, and the system being to clean the place daily. *Held*, that the above was neither a discontinuance by the plaintiffs of their user, nor an aggravation of the servitude. Also, that, although a servitude gained for one purpose cannot be used for another, the purposes before and after 1876 being identical, the user proved prior to that year supported a right in the plaintiffs to use the passage for giving access to the servants of the Municipality, for the above purpose, at reasonable and convenient times. JADULAL MULLICK *v.* GOPALCHANDRA MUKERJI 136

Road Cess Act (Beng. Act IX of 1880), ss. 52, 53—*Evidence Act, s.* 114—*Presumption.*] Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done: *Held*, that the notice provided by s. 52 of the Road Cess Act did not come within the presumption of s. 114, cl. (*e*) of the Evidence Act, and must be proved. ASHANULLAH KHAN BAHADUR *v.* TRILOCHAN BAGCHI ... 197

Sale and Delivery of Goods, Breach of Warranty on. *See* CONTRACT, BREACH OF 237

——, **Application to set aside.** *See* CIVIL PROCEDURE CODE, 1882, s. 311 ... 346

—— **for Arrears of Rent.** *See* ONUS PROBANDI 1

—— **in execution of decree.** *See* APPEAL 174

——, **Notification of—Specification of.** *See* PUBLIC DEMANDS RECOVERY ACT, ss. 10, 23 208

—— **of ancestral estate in satisfaction of Father's debt.** *See* HINDU LAW, ALIENATION BY FATHER ... 21

——— **Immoveable Property by person out of possession.** *See* TRANSFER OF PROPERTY ACT, ss. 52, 135 ... 297

Sale Proceeds, Suit for refund of. *See* LIMITATION ACT, ART. 13 ... 159

Sanction to Prosecution. *See* PENAL CODE, s. 182 270

Scheduled Debts, Interest on. *See* INSOLVENCY 66

Second Appeal—*General Clauses Act (I of 1868), s. 6—Effect of Repeal—Proceedings—Bengal Rent Act (VIII of 1885), s. 5.*] The words "any proceedings commenced before the repealing Act shall have come into operation" in s. 6 of the General Clauses Act (I of 1868) include an appeal against a decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit. In a suit between landlord and tenant a decree was passed by the lower Appellate Court on the 28th of July 1885. Under the provisions of the Act then in force, namely, Beng. Act VIII of 1869, s. 102, a second appeal to the High Court was prohibited. That Act was repealed by Act VIII of 1885, which came into force on the 1st of November 1885, this latter Act allowing an appeal to the High Court in suits similar to the one in question. A second appeal to the High Court in that suit was filed on the 18th of November 1885 *Held*, that no appeal lay. HURROSUNDARI DABI *v.* BROJOHARI DAS MANJI 86

——— **Class Magistrate.** *See* MAGISTRATE, JURISDICTION OF ... 305

——— **Prosecution for same offence on different date before Conviction.** *See* CALCUTTA MUNICIPAL ACT, s. 248 ... 108

Separate Suit. *See* CIVIL PROCEDURE CODE, 1882, s. 244 326

Set-off. *See* ACCOUNT 124

Setting up different tenure from that alleged by Landlord. *See* LANDLORD AND TENANT 248

Settlement Officer, Suit to set aside order of. *See* SONTHAL PERGUNNAHS SETTLEMENT 245

Small Cause Court, Powers of. *See* ARMY ACT, ss. 148, 151 143

——— **Presidency Towns Act (XV of 1882), s. 18**—*Jurisdiction—Army Act of* 1881 (44 *and* 45 *Vic., c.* 58), *ss.* 148, 151—*Leave to sue.*] The jurisdiction given to Small Cause Courts by Act XV of 1882 is not affected by 44 and 45 Vic., c. 58, s. 151. WALLIS *v.* TAYLOR 37

Sonthal Pergunnahs Settlement—*Regulation III of* 1872, *ss.* 24, 25—*Suit to set aside order of Settlement Officer—Non-publication of record of rights.*] Where, in December 1884, a suit was brought to set aside an order of the Settlement Officer under Regulation III of 1872, made in December 1875, after disposing of the plaintiff's objections to the defendant's title, and it was found that no record of rights had been published in accordance with s. 24 of the Regulation: *Held*, the suit was not barred under s. 25 as not having been brought within three years from the date of the order. The final order referred to in that section must be one subsequent to or not preceding the publication of the record of rights. RAM NARAIN SINGH *v.* RAM RUNJUN CHUCKERBUTTY ... 245

Specification of Notification of Sale. *See* PUBLIC DEMANDS RECOVERY ACT, ss. 10, 23 208

Specific Relief Act, 1877, s. 42. *See* DECLARATORY DECREE, SUIT FOR ... 3

——— **(I of 1877), s. 42.** *See* MULTIFARIOUSNESS 147

Stamp Act, 1879, s. 13—*Suit on bond—Stamp, Sufficiency of.*] A bond stipulated that for the consideration of a loan of Rs. 80 the debtor should deliver to the creditor on a future day "800 arris of grain valued at Rs. 10 per 100 arris." The bond was engrossed on an 8-anna stamp paper. In a suit on the bond for the recovery of 800 arris at 4 arris per rupee or its price, Rs. 200: *Held*, that the bond was adequately stamped. BHAIRAB CHUNDRA CHOWDHRI *v.* ALEK JAN 268

——— **(I of 1879), Art. 21, Sch. I.**—*Conveyance by vendors under one denomination to the same persons purchasers under another denomination.*] Eight persons, the owners of a tea estate, purported to convey their rights in the estate to a Company; the consideration expressed in the deed of conveyance being £43,320, payable in shares and debentures of the Company taken at *par*. The only shareholders or debenture-holders of the Company were the eight persons who purported to sell the estate to the Company. *Held*, that, although the conveying parties were the shareholders of the Company, there was just as much a sale and transfer of the property and a change of ownership as there would have been if the shareholders had been different persons: and that the proper duty payable on the conveyance was therefore that mentioned in Art. 21, Sch. I of the Stamp Act. *In re* THE KONDOLI TEA CO. 43

——, **Ad valorem.** *See* COURT FEES ACT 162

Statement of deceased person. *See* EVIDENCE ACT, 1872, s. 32 ... 42

Statute 44 and 45 Vic, c. 58, ss. 148, 151. *See* SMALL CAUSE COURT PRESIDENCY TOWNS ACT, s. 18 ... 37

——— ——— ———. *See* ARMY ACT 143

Successor to Judge who passed decree, Application for Review heard by. *See* REVIEW 231

Sufficient Cause. *See* LIMITATION ACT, 1877, s. 5 ... ...62, 78

Suit after rejection of claim to attached property. *See* COURT FEES ACT ... 162

—— **based on Title.** *See* BOUNDARY DISPUTE 280

—— **for refund of Sale Proceeds.** *See* LIMITATION ACT, ART. 13 ... 159

Suit for registration of Document. *See* REGISTRATION ACT, ss. 73, 76, 77 ... 264

—— **to recover purchase money after reversal of decree under which Sale took place.** *See* CIVIL PROCEDURE CODE, 1882, s. 244 326

——— **set aside Adoption.** *See* LIMITATION ACT, 1871, ART. 129 ... 308

——————— **order of Settlement Officer.** *See* SONTHAL PERGUNNAHS SETTLEMENT 245

Summary Trial. *See* PRESIDENCY MAGISTRATE 272

Tangible Immoveable Property. *See* CRIMINAL PROCEDURE CODE, s. 145 ... 179

Time for obtaining Copy of Decree. *See* LIMITATION ACT, 1877, s. 12 ... 104

Title Deeds, Deposit of. *See* EQUITABLE MORTGAGE 322

Title, Repudiation of. *See* LANDLORD AND TENANT 248

——— **Suit based on.** *See* BOUNDARY DISPUTE 280

Transfer of Decree for Execution. *See* LIMITATION 257

——————— **Property Act.** *See* MORTGAGE 262

——————————— **ss. 52, 135—** *Sale of immoveable property by person out of possession—Actionable claim.*] A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession. *A* and *B* being owners of an 8-annas share of certain immoveable property sold it under a kobala to *C* and *D*. At the time of the sale *X* and *Y* were in adverse possession of the share. *Held*, that the transaction was a sale under s. 52 of the Transfer of Property Act, to which the provisions of Chapter 8 of the Act, specially those of s. 135, were inapplicable. *Semble.*—Section 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. MUDUN MOHUN DUTT *v.* FUTTARUNNISSA 297

Transfer of Property Act, ss. 86, 87. *See* CIVIL PROCEDURE CODE, 1882, s. 311 346

——————————— **s. 135—** *Transferee of a claim for smaller value—Recovery of full amount of debt.*] It is not the object of s. 135 of the Transfer of Property Act absolutely to prevent a transferee, who has purchased a claim at a smaller value, from recovering the full amount of the debt due from the debtor. GRISH CHANDRA *v.* KASHISAURI DEBI 145

Transferee of a claim for smaller value, Recovery of full amount of debt by. *See* TRANSFER OF PROPERTY ACT, s. 135 145

Under-tenures, Avoidance of. *See* ONUS PROBANDI 1

Unregistered Mortgage. *See* REGISTRATION 70

User, Extent and mode of. *See* RIGHT OF WAY 136

——— **of twenty years to support Servitude.** *See* RIGHT OF WAY ... 136

Valuation of Suit—*Suit for pre-emption—Jurisdiction—Bengal Civil Courts Act (VI of* 1871), s. 20.] In a pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under s. 20, Act VI of 1871. NAUN SINGH *v.* RASH BEHARI SINGH 255

Wages, Right to. *See* MASTER AND SERVANT 80

Waiver of Execution of Decree. *See* LIMITATION 73

Warranty, Breach of, on Sale and Delivery of Goods. *See* CONTRACT, BREACH OF 237

Waste Lands, Measurement of. *See* BENG. ACT VIII OF 1869, s. 38 ... 57

Widow's Share. *See* HINDU LAW, PARTITION 39

Will, Construction of—*Charitable gift—Cy pres, Doctrine of—Lapse of Legacy—Costs.*] Under the will of *A* who appointed the Administrator-General of Bengal his executor, *B* had a life interest in the residue of the testator's estate. *B* brought a suit against the Administrator-General to have it declared that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between *B* and the Administrator-General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed

Will—*Continued.*

on appeal. On the question of costs, *held*, that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit. MALCHUS *v.* BROUGHTON 193

Withdrawal of one co-sharer from suit. *See* CO-SHARER 75

Witness. *See* EVIDENCE ACT, 1872, s. 154 53

Written Statement, Denial of title in. *See* LANDLORD AND TENANT ... 96

Wrongful leaving of Employment, Consequence of. *See* MASTER AND SERVANT 80

Zemindar, Suit by. *See* LIMITATION ACT, 1877, ART. 144 101

Zur-i-peshgi Lease. *See* REGISTRATION ACT, 1866, s. 17 113

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APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

GOBIND NATH SHAHA CHOWDHURI, TRUSTEE TO THE ESTATE OF PARSHADANGA CHOWDHURI, (PLAINTIFF) *v.* G. M. REILY, (DEFENDANT.)*

1886 *February* 12.

Onus probandi—Landlord and tenant—Ejectment—Under-tenures—Sale for arrears of rent—Avoidance of under-tenures—Incumbrances—Rent law—Bengal Act VIII of 1869, *ss.* 59, 60, 66.

In a suit by the purchaser of an under-tenure, under ss. 59 and 60 of the Rent Act (Beng. Act VIII of 1869), to obtain possession of lands held by the defendant, on the ground that the holdings are incumbrances which have accrued thereon by an authorized act of the previous holder of the under-tenure, it lies upon the plaintiff to show that the defendant's holdings are such incumbrances as the plaintiff is entitled to avoid under s. 66 of the Rent Act.

IN this case the material portion of the judgment appealed from is as follows:—

"These were suits by the purchaser of a putni and dur-putni to avoid under-tenures under the provisions of s. 66 of the Rent Law. The main point for decision is, if plaintiff is bound to prove that the under-tenures were created by the putnidar or dur-putnidar? I think it is clear that the plaintiff must show

* Appeals from Appellate-Decrees Nos. 784, 796 of 1885, against the decrees of H. Beveridge, Esq., Judge of Furridpore, dated the 2nd of February 1885, affirming the decrees of Baboo Durga Charan Ghose, Munsiff of Furridpore, dated 26th of January 1884.

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that his case comes under the section, and that, therefore, he must show that the under-tenures alleged to be incumbrances are really such, that is, that the putnidar, &c., made them. He has not shown this, even in a *primâ facie* manner, and therefore it follows that the Munsiff was right in dismissing the suits."

The plaintiff appealed to the High Court.

Mr. *Bell* (Baboo *Kishori Lal Sarkar* with him) for the appellant, contended that the *onus* was wrongly placed on the plaintiff, the matters to be proved being peculiarly within the knowledge of the defendant.

Baboo *Kashi Kant Sen* and Baboo *Basant Coomar Bose* for the respondent.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

On the first point raised in second appeal, that is regarding the nature of these suits, we agree with the District Judge. They are on behalf of the purchaser of an under-tenure under ss. 59, 60 of the Rent Act, to obtain possession of lands held by the defendant, on the ground that the holdings were incumbrances which have accrued thereon by an authorized act of a previous holder of that under-tenure. The plaintiff's case is not, as now contended before us, that the defendants were trespassers without any title, but that the title under which they held was voidable by the auction sale, and the object of the suits is to enforce the rights obtained by that sale.

It therefore becomes necessary to determine the next and main objection raised, that the burden of proof lies on the defendants to prove their title to remain on the lands.

It seems to us that a purchaser of an under-tenure who seeks to enforce his rights under s. 66 of the Rent Act is bound to show that the person whom he seeks to eject holds under an incumbrance of the nature therein specified—an incumbrance that he is entitled to avoid. The law does not provide that he shall obtain the under-tenure free of all incumbrances, but only "of incumbrances which may have accrued thereon by any holder of the said under-tenure," without special authority from his landlord. Consequently the plaintiff must start his case by showing that the title of the defendant so accrued.

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The only case quoted to us which is exactly in point is the case of *Durga Prasanna Ghose* v. *Kali Das Dutt* (1). The same point was raised in that case, and the opinion expressed is that which we now entertain. The other case quoted, namely *Batai Ahir* v. *Bhuggobutty Koer* (2), and the two cases *Ram Monee Mohurer* v. *Aleemoodeen* (3) and *Raj Kishen Mookerjee* v. *Pearee Mohun Mookerjee* (4) cited therein, and followed by that decision, proceed on entirely different grounds. The plaintiffs in these cases were admittedly proprietors of the lands and, as such, were entitled to exercise all the ordinary rights of ownership; and it was held in all these cases that the defendants who disputed the landlord's right to collect rents from the tenants directly, on the ground that they held intermediately, were bound to establish their title. As the plaintiff has failed to prove that the defendant holds under an incumbrance voidable under s. 66 of the Rent Act, the suits have been properly dismissed. We accordingly dismiss these appeals with costs.

P. O'K. *Appeals dismissed.*

Before Mr. Justice Field and Mr. Justice Macpherson.

KALI KISHEN TAGORE (PLAINTIFF) *v.* GOLAM ALI (DEFENDANT.)*

1886 *March* 19.

Landlord and tenant—Notice to quit—Declaratory decree—Specific Relief Act—Transfer of Property Act (IV of 1882), *s.* 42—*Discretion of Court to give a declaratory decree—Tenant setting up larger interest than he is entitled to.*

A plaintiff, admitting a defendant's right to a *kursa-jama* tenure in certain lands, but denying a permanent *malguzari* tenure set up by him, sought to eject the defendant from the *kursa-jama* holding, and for a declaration that the defendant was not entitled to the permanent *malguzari* tenure: *Held*, that the plaintiff was entitled to the declaration asked for, notwithstanding that in consequence of his failure to prove a reasonable notice to quit, he was unable to obtain a decree for ejectment.

A Judge, interfering with the discretion exercised by a lower Court in granting a declaratory decree, should state his reasons for so doing.

The principle laid down in *Vivian v. Moat* (5) is not applicable to this country.

* Appeal from Appellate Decree No. 329 of 1885, against the decree of H. Beveridge, Esq., Judge of Furridpore, dated the 19th of December 1884, reversing the decree of Baboo Jagat Durlubh Mozoomdar, Subordinate Judge of Furridpore, dated the 22nd of December 1883.

(1) 9 C. L. R., 449.
(2) 11 C. L. R., 476.
(3) 20 W. R., 374.
(4) 20 W. R., 421.
(5) L. R. 16 Ch. D., 730.

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THE plaintiff in this case alleged that the defendant was in occupation of two plots of land under a *kursa-jama* or ordinary *ryati-jama* from which he, as tenant thereof, could be ejected at will; that while in such occupation he had built huts upon the land and had committed various other acts of encroachment inconsistent with the rights of a tenant holding a *kursa-jama*; that moreover the defendant, in a previous suit No. 23 of 1878, had put in a written statement setting up as against him (the plaintiff) a permanent *malguzari jama*, including therein the two disputed plots, and alleged that such *jama* had been in possession of him and his predecessors from a time previous to the Permanent Settlement (but that most of the documents put in to support the defendant's statement had been proved to be forgeries); that he had served on the defendant, on the 1st October 1881, a notice calling upon him to quit by the 14th November 1881.

On these allegations the plaintiff on 8th August 1882 brought this suit, praying (1) that the defendant's allegation of a permanent *malguzari jama* might be set aside; (2) that the defendant might be ejected from the two plots of land, and that he, the plaintiff, might be put into possession thereof.

The defendant admitted the notice to quit, but objected that it was an unreasonable one, and stated that his predecessors, and subsequently he himself, had possessed and enjoyed the disputed lands in right of a permanent fixed *malguzari jama* and claimed a right of occupancy therein.

The Subordinate Judge amongst others fixed the following issues: (1) Is the notice good? (2) Whether the disputed land was the permanent *malguzari* right alleged by the defendant? (3) Whether or not the defendant had a right of occupancy? And in determining these issues held, that the defendant was entitled to a six months' notice expiring at the end of the year, this being in his opinion a reasonable notice; that the defendant not having been served with such a notice, the plaintiff was not entitled to a decree for possession; that the defendant had no permanent *malguzari jama* in the disputed lands, and that he had no right of

occupancy therein; he therefore gave the plaintiff a decree declaring that the defendant was a tenant from year to year liable to be ejected by a six months' notice to quit expiring at the end of the year.

The defendant appealed to the District Judge, and the plaintiff cross-appealed as to the question of notice.

The District Judge held that the notice to quit was not a reasonable one, on the ground "that it was utterly unreasonable to ask the defendant to give up in a month and twenty-four days land which he had held for so long a time, and which with permission of the plaintiff's agents he had covered with buildings," and set aside the declaratory decree made by the lower Court, on the ground that a suit would not lie to set aside an allegation, holding that even if such suit would lie, this was not a case in which a Court in exercising its discretion should grant such relief.

The plaintiff appealed to the High Court.

Mr. *Woodroffe* (with him Baboo *Kali Mohun Das* and Baboo *Durga Mohun Das*) for the appellant contended that no notice to quit was necessary as the defendant has repudiated the true position of his landlord, setting up a larger interest than he was entitled to, *viz.*, a permanent *malguzari jama*, he being entitled merely to a *kursa-jama*—*Vivian* v. *Moat* (1), *Baba* v. *Vishvanath Joshi* (2); and further contended that a declaratory decree could be made in the case—*Nilmony Singh* v. *Kally Churn Bhattacharjee* (3), and *Kathama Natchiar* v. *Dora Singa Tevar* (4); and that the District Judge was not justified in interfering with the discretion exercised by the lower Court granting such relief, no reasons having been given in his judgment for so doing.

Mr. *Bell* (with him the *Advocate General* (Mr. *Paul*), and Baboo *Rash Behari Ghose*) for the respondent.

Mr. *Bell*.—The notice being insufficient, the case ought to have been dismissed without any decision on the other issues. *See* Field's Rent Digest, Article 89, p. 62, and *Bissesuri Dabeea* v. *Baroda Kant*

(1) L. R., 16 Ch. D, 730.
(2) I. L. R., 8 Bom., 228.
(3) L. R. 2 I. A., 83; 14 B. L. R., 382.
(4) L. R. 2 I. A., 169; 15 B. L. R., 83.

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Roy Chowdry (1). A declaratory decree to set aside an allegation will not lie—*Nilmony Singh* v. *Kully Churn Bhattacharjee* (2), *Kathama Natchiar* v. *Dora Singa Tevar* (3), *Sreenarain Mitter* v. *Kishen Soondery Dassee* (4), *Sheo Singh Rai* v. *Dakho* (5).

The judgment of the Court (FIELD and MACPHERSON, JJ.) was delivered by

FIELD, J., who after setting out the facts continued.—The first point pressed upon us in appeal is that no notice was necessary, because the defendant being entitled merely to *kursa-jama* had set up a larger interest in himself, *viz.*, a permanent *malguzari jama*, had repudiated the true position of his landlord, and might therefore be ejected at once without notice. In support of this contention the case of *Vivian* v. *Moat* (6) was relied upon. In that case the tenant defendant had disputed his landlord's right to raise the rent. Fry, J., said: "Every landlord, in the ordinary sense of the word, has in popular language a right to raise the rent," and he considered that the denial of the landlord's right to raise the rent being a suggestion that the landlord was not an ordinary landlord of the estate, but either a lord of the manor or an owner of some other right which gave him a title to a customary rent merely, was in fact a renunciation or disclaimer of the landlord's title. We think that the ground of this decision rests mainly upon the relation of landlord and tenant, as it exists in England, where such relation depends upon contract, and that the principle of this case is not applicable to this country, where a different state of things prevails. In this country there are numerous tenures the rent of which cannot be raised, and the denial of the landlord's right to raise the rent is not necessarily a renunciation or disclaimer of his title as landlord.

The next question argued before us is concerned with the reasonableness of the notice. Whether a notice is or is not reasonable is a question of fact, and therefore ordinarily the decision of this question is not open to second appeal. But if the finding of the Court below is based upon no evidence, or

(1) I. L. R., 10 Calc., 1076.
(2) L. R. 2 I. A., 83; 14 B. L. R., 382.
(3) L. R. 2 I. A., 169; 15 B. L. R., 83.
(4) 11 B. L. R., 171.
(5) I. L. R. 1 All., 688.
(6) L. R. 16 Ch. D., 730.

upon reasons, all of which are untenable, no doubt the propriety of such finding might be questioned upon second appeal. The Judge in the Court of first instance thought the notice unreasonable, because it did not expire at the end of the year, and further, because it was not a six months' notice which he thought would under the circumstances be a reasonable notice. The first ground is absolutely untenable. There is no law in this country which requires a notice to quit in a case of this kind to expire at the end of the year. The second ground is also bad, because there is no law which requires a six months' notice to be given. What the Judge ought to have found was, not what notice would have been reasonable, but whether the notice actually given in this case was or was not reasonable. If the Judge in the lower Appellate Court had merely adopted the reasons given by the Subordinate Judge, it might fairly be contended that his finding was open to question in second appeal. We think, however, that although he has adopted the Subordinate Judge's finding, he has not adopted his reasons, but has exercised his own judgment upon the evidence in the case. He says at page 31: "The defendant urges that this notice is unreasonable, and the Subordinate Judge holds that it is so. So far I quite agree with the Subordinate Judge." Here he agrees in what the Subordinate Judge holds, but he does not express his concurrence in the reasons given by the Subordinate Judge for his finding; and from his observations at page 33 it appears that he did not concur in the view taken by the Subordinate Judge that there should be a six months' notice. At page 32 the District Judge says: "Under any circumstances it was utterly unreasonable to ask defendant to give up in a month and twenty-four days land which he had held for so long, and which with the permission of plaintiff's agents he had covered with buildings." We think that this is a finding of fact that the notice of one month and twenty-four days given to the defendant was not a reasonable notice. The District Judge then proceeds to give his reasons, and it has been pressed upon us that in giving these reasons he has omitted to consider many facts and circumstances in the case which should have weighed with him in forming his opinion upon the question which he had to decide. It may

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be quite possible that the Judge has not dealt with this question as fully and satisfactorily as could be wished; but nevertheless we are of opinion that we cannot enter upon an examination of the evidence upon second appeal, and that we are precluded from interfering with the finding of fact arrived at by the Judge.

The next question with which we have to deal resolves itself into two parts: *first*, was the District Judge right in thinking that no declaratory decree could according to law be made in this case; and, *secondly*, was he justified in interfering with the exercise of discretion by the Court of first instance in making such a decree.

As to the first point we think that the Judge was in error in holding that a declaratory decree could not, according to law, be made in the present case. In the two cases in *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1) and *Kathama Natchiar* v. *Dora Singa Tevar* (2), their Lordships of the Privy Council deal with the provisions of s. 15 of Act VIII of 1859. This section has been repealed, and the provisions of the present law, s. 42 of the Specific Relief Act, are materially different. The provisions of s. 42 are as follows: "Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." Now, what the plaintiff asks in this case is that the defendant's declaration as to having a permanent *malguzari jama* be set aside. We must not in this country tie up parties too strictly to the language of their pleadings, and we must look, not at this language merely, but at the substance of the thing. The plaintiff admits that the defendant has a *kursa-jama*, but he denies that the defendant has the much larger interest asserted by him, *viz.*, a permanent *malguzari jama*. In other words, he alleges that the interest which is vested in himself is the whole proprietary right less a *kursa-jama* belonging to the defendant, and that it is not a much smaller interest, *viz.*, the proprietary right less a permanent

(1) L. R. 2 I. A., 83; 14 B. L. R., 382. (2) L. R. 2 I. A., 169; 15 B. L. R., 83.

protected tenure, that is, a permanent *malguzari jama.* Let us now see what the pleadings were. In the sixth paragraph of his written statement the defendant alleged that for more than twelve years before the service of the notice, he and his predecessor had been possessing and enjoying the disputed lands in right of a permanent fixed *malguzari jama,* and exercising the aforesaid permanent *malguzari* right over the same; and in the nineteenth paragraph he alleged as follows: "From before the Decennial Settlement, from the time of the plaintiff's predecessors, I have been from the time of my forefathers enjoying and possessing the disputed lands together with some other lands of mouzah Ghatakhal and Turbhunaia at a rent formerly of Sicca Rs. 7-12-4-1-2 kag, and then of Company's Rs. 8-4-6 pie as permanent *mokurrari* transferable *malguzari jama* held and possessed from generation to generation, first by clearing the jungles and preparing gardens on the same, and then by settling tenants here and there from time to time, and preparing gardens and excavating tanks, &c., on the same. My right of occupancy is of course involved in that superior right of mine." The Subordinate Judge fixed among other issues the following, namely, the tenth, "whether or not the disputed land is the permanent right alleged by the defendant in the nineteenth paragraph of his written statement," and the fifteenth, "whether or not the defendant has a right of occupancy in the land." Finding these two issues against the defendant, he made a declaration that the defendant has no permanent or protected holding in the land, not even a right of occupancy; that he is a tenant from year to year, and is liable under the circumstances to be ejected on a six months' notice to quit expiring at the end of the year. Now, there can be no doubt that this declaration is too wide, and that so far as regards the statement that the defendant is a tenant from year to year, and is liable under the circumstances to be ejected on a six months' notice to quit, expiring at the end of the year, it should not have been made. But it is contended that the plaintiff is entitled to a declaration upon the finding upon the tenth and fifteenth issues, that the defendant is not entitled to such a permanent

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right as that alleged in the nineteenth paragraph of his written statement, and that he has not a right of occupancy in the land. It appears to us that as a matter of law such a declaration can be made under the provisions of s. 42 of the Specific Relief Act. This view is in conformity with the case of *Rajundur Kishwar Sing* v. *Sheopursun Misser* (1), see the remarks of their Lordships of the Privy Council at pages 449 and 450. This case, it is to be observed, was decided before s. 15 of Act VIII of 1859 was enacted. Then the case of *Bissesuri Dabeea* v. *Baroda Kant Roy Chowdry* (2), decided after the passing of the Specific Relief Act, though not exactly in point, lends a certain support to the view which we take. It has been contended that, inasmuch as the plaintiff sued for ejectment, and the declaration which he asks for is merely ancillary to this ejectment, the declaration should not be made. This is no doubt a good argument, as regards that portion of the declaration made by the Court of first instance, which we have above intimated, cannot be sustained. It has also some force, as regards the portion of the declaration, based on the finding upon the fifteenth issue ; and as regards this issue we may further observe that the plaintiff has not asked that it be declared that the defendant has not a right of occupancy. It appears to us that the whole of the pleadings fairly construed show that the plaintiff sought two things: *first*, to have it declared that the defendant had not a permanent *malguzari* tenure, or, in other words, that the interest in him, the plaintiff, was the whole zemindari interest less a *kursa-jama* ; and *secondly*, to have the defendant evicted from this *kursa-jama* upon service of notice to quit. We think that these two things are separate, and that the plaintiff may well have the declaration which he asks for, even though in consequence of his failure to prove a reasonable notice he is unable to proceed to the ejectment of the defendant. Having regard to the proviso of s. 42, it may be observed that in respect of the interest as to which the plaintiff seeks a declaratory decree no further relief is possible, and that the further relief which would have been possible, if a proper notice had been served, is sought not in respect of the interest which

(1) 10 Moore's I. A., 438. (2) I. L. R., 10 Calc., 1076.

the plaintiff claims to have and which in substance he asks to have declared, but in respect of the interest which he admits the defendant to have, *viz.*, a *kursa-jama.* We think, therefore, that under the present law, s. 42 of the Specific Relief Act, (and see the illustrations to this section), such a decree as that which is now asked can be made. Then it is said that the plaintiff seeks merely to set aside an allegation. There can be no doubt that a declaratory decree ought not to be made to set aside a mere allegation; but in the present case the defendant's conduct amounts to something more. In the previous case, No. 23 of 1878, he set up this permanent *malguzari jama* and he produced documentary evidence to prove it. He is found to have since been exercising rights in the land inconsistent with a *kursa-jama* interest, though consistent with the permanent *malguzari jama* which he alleges, and in the present case he has repeated this allegation of a permanent *malguzari jama,* and has again brought forward documentary evidence to prove it (a large portion of which evidence has been found to be forged).

The next question with which we are concerned is that of discretion. The Judge in the Court of first instance in the exercise of his discretion made a declaratory decree. The District Judge set aside the decree, because in his view it cannot be made under the present law, and then at the end of his judgment he says: "Finally I must remark with special advertence to *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), that the granting of a declaratory decree is discretionary with the Court, and that even if there was no rule of law against making the declaration asked for by the plaintiff, this is not a case in which such relief should be granted." Now, if the second portion of this sentence be construed as referring to the case of *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), the reasons which may be assumed to have influenced the Judge have no existence, because that case was governed by s. 15 of Act VIII of 1859, which has no application in the present case, and the Lords of the Privy Council, after expressing their opinion at the bottom of page 85 that that was not

(1) L. R., 2 I. A., 83; 14 B. L. R., 382.

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a case in which, in the proper exercise of discretion, a declaration of title should be made, proceeded to state what the facts were; that the real object of the suit was to obtain a general declaration against a number of persons holding different rights. The facts of the present case are not analogous, and, therefore, the same reasons do not apply. If, on the other hand, the second part of the sentence above quoted is to be construed as having no reference to the case of *Nilmony Singh* v. *Kally Churn Bhattacharjee* (1), then the Judge reverses the exercise of discretion by the Court of first instance without assigning any reason for so doing, and such a judgment cannot stand. In the case of *Sreenarain Mitter* v. *Kishen Soondery Dassee* (2), their Lordships of the Privy Council said: "It is not a matter of absolute right to obtain a declaratory decree. It is discretionary to the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for." The Lords of the Privy Council heard that case as a second appeal, and putting themselves in the position of the High Court hearing a second appeal they made it a ground of their decision, that it would not be exercising a sound discretion, even if it could be done, to make the declaratory decree asked. In the case now before us the Judge has exercised no judgment, he has given no reasons for interfering with the exercise of discretion by the Court of first instance.

We must, therefore, set aside his reversal of the Subordinate Judge's exercise of discretion as to the granting of a declaratory decree, and the case must go back in order that the Judge, in the Court below, may determine the question of fact raised by the tenth issue. If this issue is found against the defendant and in favor of the plaintiff, the plaintiff will be entitled to a decree declaring that the defendant has not the rights put in issue thereby.

Case remanded.

T. A. P.

(1) L. R. 2 I. A., 83; 14 B. L. R. 382.
(2) 11 B. L. R., 171, at p. 190.

Before Mr. Justice McDonell and Mr. Justice Beverley.

NOOR ALI CHOWDHURI (JUDGMENT-DEBTOR) *v.* KONI MEAH AND OTHERS (DECREE-HOLDERS).*

1886 *March* 5.

Bengal Act VIII of 1869, *s.* 52—*Decree for rent, Execution of—Appellate Decree, Effect of—Liability to Ejectment.*

A decree under s. 52, Bengal Act VIII of 1869 (*a*) provided that unless the amount due was paid within 15 days from the date thereof, the tenant (judgment-debtor) would be liable to ejectment. That decree was confirmed in appeal, *no steps to execute it having been taken in the meantime.* The tenant paid the decretal amount into Court within 15 days of the appellate decree.

Held, that inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree, and was the only decree of which execution could be taken, the tenant (judgment-debtor) having paid the decretal amount within 15 days of that decree was protected from ejectment.

THIS was a proceeding in execution. The decree which was one under s. 52 of the Rent Act (Bengal Act VIII of 1869) provided that unless the arrears of rent with costs and interest were paid within 15 days of the date thereof, the tenant should be liable to ejectment from his holding. It was confirmed in appeal some six months afterwards, and within 15 days of the appellate decree, the judgment-debtor deposited the necessary amount in Court. The decree-holder who had taken no steps to execute the original decree now made an application to be put in possession of the holding. The question arose whether the period of 15 days should be computed from the date of the original or the appellate decree. The Munsiff, referring to *Puresh Nath Ghose* v. *Kristo Lal Dutt* (1), decided the point in favour of the decree-holder, and granted the application. On appeal the District Judge confirmed the order of the lower Court. The judgment-debtor then appealed to the High Court.

Munshi *Serajul Islam* for the appellant.

* Appeal from order No. 103 of 1885, against the order of R. H. Greaves, Esq., Officiating Judge of Chittagong, dated the 5th of January 1885, affirming the order of Baboo Nritya Gopal Sarkar, Officiating Moonsiff of North Roojan, dated the 8th of March 1884.

(*a*) Section 66, Cl. 2, Bengal Act VIII of 1885.

(1) 23 W. R., 50.

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Mr. *C. Gregory* for the respondents.

The following was the judgment of the Court (McDONELL and BEVERLEY, JJ.)

In this case a decree for arrears of rent was passed against the appellant on the 27th December 1882, and coupled with it an order that if the arrears so decreed were not paid within 15 days from the date of the decree, the appellant should be liable to ejectment from his holding. Against this decree the appellant preferred an appeal which was dismissed on the 17th of July 1883, and within 15 days from that date the appellant paid into Court the amount of the arrears decreed; no execution of the original decree having been taken out in the meantime.

The sole question that arises now is whether the appellant, not having paid the arrears within 15 days from the date of the original decree, is still liable to ejectment under the terms of that decree, notwithstanding the fact that the arrears were paid within 15 days from the date of the decree in appeal.

Both the lower Courts have found against the appellant on this point; but after taking time to consider the question, we are of opinion that this finding ought not to be upheld.

In arriving at his decision the Munsiff has relied on the case of *Puresh Nath Ghose* v. *Kristo Lal Dutt* (1), but that decision, we think, does not conclude the point in question, and we are not aware of any other direct authority in the matter.

In the case cited there would seem to have been no appeal and consequently no appellate decree. According to the judgment, "the Munsiff had attempted to modify his decree in review; but it is now finally held that the order of the Munsiff granting the review was illegal, and it is finally declared that his proceedings in that respect were void. The original decree, therefore, as made by the Munsiff stands, and that is the decree which is now to be carried out." It is clear, therefore, that that decision has no applicability to the circumstances of the present case in which the question is whether the appellant is liable to ejectment notwithstanding that he paid up the arrears within 15 days from the date of the appellate decree.

(1) 23 W. R., 50.

We have been unable to find any express authority on the precise point now before us, but we think that there is direct authority, not only in reported cases, but in the Code of Civil Procedure itself, for holding that the appellate decree, even where the appeal is merely dismissed, supersedes the original decree, and is the only decree that can be executed if execution has not already been had upon the original decree.

In the Full Bench case of *Luchman Persad Singh* v. *Kishen Persad Singh* (1), it was decided that even though the appellate decree did nothing more than confirm the decree of the lower Court, it was the paramount decision in the case, and that execution should be taken out of that appellate decree and not of the decree which it confirmed; and the question of limitation which was in issue in that case was decided upon this ground.

In the case of *Kristo Kinkur Roy* v. *Raja Baroda Kant Roy* (2), decided by the Privy Council in 1872, the following observations occur: "The state of the Indian authorities upon the general question seems to be this. In the case before us the High Court obviously proceeded upon the principle that a simple decree of affirmance did not so incorporate the mandatory part of the original decree as to make for all purposes the decree of the Appellate Court the sole decree to be executed. And this ruling appears to have been followed in the case of *Chowdhry Wahed Ali* v. *Mullick Inayet Ali* (3), in which it was ruled that in order to make the decree of the Appellate Court the final decree in the suit for all the purposes of execution, it was necessary that it should have decreed a material modification of the original decree. The rule so expressed seems open to the objection of vagueness. The Full Bench of the High Court of Bengal, however, in *Ram Charan Bysack* v. *Lakhi Kant Bunnik* (4), has ruled that whether the decree of the lower Court is reversed or modified or affirmed, the decree passed by the Appellate Court is the final decree in the suit; and in the words of Mr. Justice Mitter 'as such the only decree which is capable of being enforced by execution.' And that is in accordance with the Madras decision in *Aruna Chella Thudayan* v.

(1) I. L. R. 8 Calc., 218.
(2) 14 Moore's I. A., 465; 10 B. L. R., 101.
(3) 6 B. L. R., 52.
(4) 7 B. L. R. 704; 16 W. R. F. B., 1.

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Veludayan (1). Chief Justice Scotland's words are: 'Whether that decree be in affirmance or reversal or modification of the decree appealed from, it becomes the final decree in the suit, and therefore the decree enforceable by execution.'"

Section 579 of the Code provides that the decree of the Appellate Court "shall specify clearly the relief granted or other determination of the appeal," and "shall also state the amount of costs incurred in the appeal and by what parties and in what proportions such costs, *and the costs in the suit*, are to be paid." We think that these words clearly show that the appellate decree is intended to supersede the original decree. Then s. 583 goes on to say: "When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall *proceed to execute the decree passed in appeal* according to the rules hereinbefore prescribed for the execution, of decrees in suits."

It seems to us clear, therefore, that the decree, and the only decree, of which execution could be taken out was the appellate decree. That decree must be presumed to have incorporated the terms of the original decree, and if the arrears were paid within 15 days from its date the appellant was not liable to be ejected.

The words of s. 52 of Bengal Act VIII of 1869 are: "In all cases of such suits for the ejectment of a rayat or the cancelment of a lease the decree shall specify the amount of the arrear, and if such amount, together with interest and costs of suit, be paid into Court within 15 days from the date of the decree, execution shall be stayed."

It was of course open to the decree-holder to take out execution of the original decree at any time before it was superseded by the decree in appeal. Not having done so, we are unable to see that he has any real grievance because the terms of the appellate decree have been complied with by the appellant.

The order of the lower Appellate Court is accordingly reversed and the appellant is declared to be not liable to ejectment. The appellant will also have his costs in all the Courts.

K. M. C. *Appeal allowed.*

(1) 4 Mad. H. C., 215.

Before Mr. Justice O'Kinealy and Mr. Justice Macpherson.

NUNDO LALL BHUTTACHARJEE AND OTHERS (PLAINTIFFS) *v.* BIDHOO MOOKHY DEBEE (DEFENDANT.)*

1886 *March* 9.

Res-judicata—Landlord and tenant—Suit in ejectment—Issue previously heard and determined—Estoppel—Civil Procedure Code, s. 13.

In a suit by a landlord against his tenant for ejectment, the defences were (1) no notice to quit had been served, and (2) the tenure was a permanent one. The suit was dismissed on the first ground, the Court holding at the same time that the tenure was not a permanent one. In a subsequent suit for ejectment from the same holding, brought by the same plaintiff against the same defendant, the defences were: (1) the tenure was permanent; and (2) the plaintiff was estopped by the conduct of his predecessor in title from asserting as against the defendant that the tenure was not a permanent one. The lower Appellate Court found the question of estoppel in favour of the defendant, and dismissed the suit.

On appeal to the High Court—

Held, that the decision was right, and must be affirmed.

Semble, that where a former suit between the same parties in respect of the same subject matter has been dismissed on a preliminary point, a finding in that suit on the merits in the plaintiff's favour will not bar the defendant from putting forward the same defence on the merits in a subsequent suit by the same plaintiff against the same defendant.

Semble, that the case of *Niamut Khan* v. *Phadu Buldia* (1) has been impliedly overruled by the case of *Run Bahadoor Singh* v. *Lucho Koer* (2).

THIS was a suit for possession of certain land. The plaint stated that the land in question was the auction-purchased paternal *jama* lands of the plaintiffs; that the defendant's predecessors in title had held the land under the plaintiffs as tenants-at-will; that the defendant's predecessors in title had sold their interest therein to the defendant wrongly describing it as a *mourasi mokurari* right; that the plaintiffs had duly served the defendants with a notice to quit and deliver up possession of the land; and that in a former suit between the plaintiffs and the defendant it

* Appeal from Appellate Decree No. 1398 of 1885, against the decree of Baboo Saroda Prosad Chatterji, Officiating Third Subordinate Judge of Hooghly, dated the 9th of April 1885, reversing the decree of Baboo Tara Prosunno Banerji, First Munsiff of Howrah, dated the 31st of January 1884.

(1) I. L. R., 6 Calc., 319.

(2) L. R., 12 I. A., 23; I. L. R., 11 Calc., 301.

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had been decided by a competent Court that the defendant had no permanent interest in the land. The plaintiffs prayed "that the Court will be pleased to remove the houses, &c., belonging to the defendant which are on the disputed land, and to decree that direct possession be delivered to the plaintiffs," and for further relief.

The defence was that the defendant's tenure was a permanent tenure; that no notice to quit had been served by the plaintiffs; and that, whether the tenure was permanent or not, the plaintiffs' father and predecessor in title, Lall Mohun Bhuttacharjee, had induced the defendant to buy the tenure from the defendant's predecessor in title on the representation that the tenure was a permanent one.

As to the previous suit relied on by the plaintiffs, it appeared that in 1879 the plaintiffs had brought a previous suit for ejectment from the same land. In the first Appellate Court that suit was dismissed, on the ground that service of the notice to quit had not been proved; but the Court held at the same time that the tenure was not a permanent one. The defendant appealed to the High Court against this finding of the first Appellate Court, but the appeal was dismissed, on the ground that the only decree passed by the first Appellate Court was a decree dismissing the suit; that the finding appealed against formed no part of that decree, but was only to be found in the judgment of the first Appellate Court, from which judgment no appeal lay under the Civil Procedure Code.

In the present suit the Court of first instance found in favour of the plaintiffs, but this decision was reversed on appeal, the lower Appellate Court finding in favour of the defendant on the question of estoppel. The plaintiffs appealed to the High Court.

Baboo *Hem Chunder Banerjee* and Baboo *Umakali Mookerjee* for the appellants, contended that the former decision was *res-judicata*—*Niamut Khan* v. *Phadu Buldia* (1), and that the facts relied on by the Judge did not constitute an estoppel.

Baboo *Bash Behary Ghose* for the respondent.

(1) I. L. R., 6 Calc., 319.

The judgment of the Court (O'KINEALY and MACPHERSON, JJ.) was as follows :—

It appears that, previous to the present suit, there was a suit between the same parties in which the plaintiffs sought to eject the defendant.

That suit was dismissed, but in the course of the trial, the Court came to a decision upon the nature of the defendant's holding.

In the present suit, the plaintiffs seek, anew, to recover possession of the land after notice to quit, and the lower Court has held that the decision arrived at by the Court in the previous suit is binding between the parties ; but that as in the previous suit no issue regarding the question of estoppel by conduct was raised, the defendant is not precluded from raising it in the present suit; and on that ground judgment has been given in favour of the defendant.

The plaintiffs have appealed, and they urge that the previous decision is, as has been held by the Court below, *res-judicata*, and being *res-judicata* that Court was precluded from going behind the previous decision and taking notice of the question of estoppel. They further contend that the inducement was too remote to affect the conduct of the defendant, and that the Subordinate Judge was wrong in holding that there was an estoppel by conduct.

This last is a question of fact with which we are not competent to deal. The Judge has declared that "it is clear that Lall Mohan by his words and conduct induced the appellant to believe that Panchcowri's interest in the property was of a permanent character and to part with a large sum of her money in consequence of that belief for purchase of the land."

In regard to the first question raised by the appellant, namely, whether the decision arrived at in the previous case is *res-judicata* and binding between the parties, we have come to the conclusion that it is not.

No doubt it has been held by a Full Bench of this Court that even where the defendant does not get the issue decided against him inserted in the decree, it is binding between the parties in a subsequent litigation. But this procedure was not followed in

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the case of *Run Bahadoor Singh* v. *Lucho Koer* (1), and in regard to that their Lordships state as follows:—

"The widow has not appealed against the decree, nor could she, because it is in her favour. But she has appealed against the finding that the brothers were joint in estate. It may be supposed that her advisers were apprehensive lest that finding should be hereafter held conclusive against her. This could not be so inasmuch as the decree was not based upon it, but was made in spite of it."

Here, in the former suit between the present parties, the decree dismissing the suit was not based on the finding adverse to the defendant in that case, but in spite of it. We think, therefore, after looking at the decision of their Lordships in the Privy Council, that the previous decision is not binding between the parties in this suit.

Further, we are of opinion that, even if we come to an opposite conclusion, the respondent is correct in saying that the issue then decided was not an issue regarding any estoppel by conduct.

What was decided there was, what was the right to the property, not whether the plaintiffs are estopped by their conduct from asserting their right, if it existed.

From this point of view also we think the decision of the lower Court was correct.

The appeal is therefore dismissed with costs.

P. O'K. *Appeal dismissed.*

(1) L. R., 12 I. A., 23; I. L. R., 11 Cal., 301.

PRIVY COUNCIL.

NANOMI BABUASIN AND OTHERS (PLAINTIFFS) *v.* MODHUN MOHUN AND OTHERS (DEFENDANTS.)

P. C.*
1885
June 24 *and* 30, *July* 1, *and December* 1.

[On appeal from the High Court at Calcutta.]

Hindu Law—Alienation by Father—Mitakshara and Mithila Law—Execution of decree—Sale of ancestral estate in satisfaction of father's debt—Liability of sons' shares—Parties to proceedings.

There is no conflict of authority as to the principle that sons cannot set up their rights, which are to take present vested interests, on their birth, jointly with their father in ancestral estate, against their father's alienation for an antecedent debt, or against his creditors' remedies for his debt, if such debt has not been contracted for an immoral purpose; the law on this point being the same under the Mitakshara and the Mithila shasters.

From the above must be distinguished the question how far the joint sons can be precluded from disputing the liability attaching to their shares, where proceedings have been taken by, or against, the father alone.

If the father's debt, not having been contracted for an immoral purpose, is such as to support a sale of the entirety of the joint estate, either he may sell the latter without suit, or the creditor may obtain a sale of it by suit. But the joint sons, not being parties to the execution proceedings or to the sale, are not precluded from having a question as to the nature of the debt tried in a suit of their own; a right which will, however, avail them nothing unless it can be shown that the debt was not such as to justify a sale of the joint estate.

If, upon the proceedings and in regard to the intention of the parties, doubts are raised whether what has been sold is the interest of the father alone, or the joint estate, the absence of the sons from the proceedings may be a material consideration. But, if the purchaser has bargained and paid for the entirety, he may defend his title upon any ground which would have justified a sale, had the sons been brought in to defend their interests in the execution proceedings.

Deendyal v. *Jugdeep Narain Singh* (1) does not lay down as an invariable rule that co-parcenary interests will not pass by an execution sale unless the co-parceners are joined in the suit, or that only the father's interest passes to the purchaser where the suit was against the father alone.

This debt being one which must be taken as a joint family debt, though the suit upon it was against the father alone, *held*, that a claim by minor sons for exemption of their shares failed on the merits, the entire family estate having passed by the sale.

* *Present:* LORD MONKSWELL, LORD HOBHOUSE, SIR B. PEACOCK, AND SIR R. COUCH.

(1) L. R. 4 I. A., 247; I. L. R. 3 Calc., 198.

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APPEAL from a decree (16th June 1882) of the High Court, reversing a decree (14th May 1879) of the Subordinate Judge of Bhagulpur.

The question raised on this appeal was whether the entirety of a family estate, including the shares of minor sons, who were jointly interested in it with their father, had passed to a purchaser at a sale in execution of a decree obtained against the father alone, the minors not having been represented in the suit, nor in the execution proceedings.

Kirat Singh, who died in 1858, gave shares in his estate, Mouzah Lalpur Bhatkera in Tirhut, to his two sons, one of whom was Girdhari Singh, the father of the two minor plaintiffs in this suit, now the appellants. Litigation between the brothers resulted in a decree, whereby Girdhari Singh obtained an eight annas 11¼ gundas share of the mouzah.

The minor sons of Girdhari were both born before November 1864, in which year, having borrowed Rs. 45,000 from one A. Christian, he executed leases of the above share of the mouzah to H. Collis, son-in-law of his creditor, for repayment of that sum, as advanced zar-i-peshgi. On the death of Collis occurring in 1869, and the leases passing to the widow of the latter, Girdhari Singh dispossessed her.

Bringing a suit against him, the widow obtained a decree (10th April 1871) for possession with mesne profits, interest and costs; and in satisfaction of the money also decreed, now amounting to Rs. 51,767, obtained an order (15th January 1872) for the sale of the eight annas 11¼ gundas share of Lalpur Bhatkera. It was accordingly sold to Hardinarain, now represented by the respondent, Modhun Mohun, and the sale was confirmed in April 1872 by the District Court of Bhagulpur. Girdhari Singh in vain attempted to get this sale set aside, it being in the end upheld by order of Her Majesty in Council (19th May 1876).

The present suit (14th September 1878) was brought on behalf of Girdhari's minor sons by their mother, and afterwards by leave on her own behalf also, against the purchaser and Girdhari Singh, on the ground that the eight annas 11¼ gundas share being ancestral property had not been sold under such circumstances as to deprive the plaintiffs of their shares. They claimed that the

interest of Girdhari Singh alone passed by the sale, and that, on their shares being ascertained by partition, they should have them; Nanomi Babuasin, the mother, being entitled to one-fourth, and three-fourths being divisible between the minors on the one hand, and the auction-purchaser on the other.

The principal defence, which was that by the sale of 1872 the entirety of the family estate passed to the purchaser, raised the question disposed of on this appeal.

Upon other issues, the Subordinate Judge having found that Nanomi Babuasin had a money provision made for her at her marriage by her father-in-law, held that she was disentitled, under the law of Mithila, to a share on the partition of the family estate; and he was of opinion that the father was entitled to a double share. But on the principal question, he decided that the decree of 10th April 1871 did not extend over, or bind, the entirety of the joint property, the members of the family entitled to shares in it not having been made defendants in the suit, or parties to the decree, along with Girdhari Singh, whose share alone was liable for the debt.

The judgment of the Court of first instance as to this part of the case was reversed by a Divisional Bench of the High Court (CUNNINGHAM and PRINSEP, JJ.) The above decision as to the shares of Nanomi Babuasin and of Girdhari Singh was approved by the Appellate Court; but in regard to its judgment on the principal point, *viz.*, that the entire family estate passed by the sale of 1872, it became unnecessary to decide those subordinate questions.

That part of the judgment of the senior Judge of the Bench, CUNNINGHAM, J., which related to the principal point, was as follows:—

"In the first place, then, what did the auction sale purport to convey to the purchaser? The decree in this case was for restoration to the plaintiff of the possession to which she was entitled under the lease, and for payment of mesne profits. It did not affect any specific portion of the estate, and in this respect the present case differs from those in which a specific portion of the estate having been mortgaged a decree was given for its sale, and no question as to the actual property sold could arise. This being

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so, we have next to look to what the language of the sale proceedings expresses to be the subject of the sale. In the petition for execution an inventory of the judgment-debtor's property was given, which described it as 'the share of eight annas 11¼ gundas out of the entire 16 annas, the right and interest of the judgment-debtor in Mouzah Rampur Bhatkera, bearing a jumma of Rs. 8,106-11,' and prayed that this might be attached and sold. The proceeding confirming the sale and the certificate of sale produced at the hearing of the appeal, are to the same effect, *viz.*, describing the property as 8 annas 11¼ gundas share, and stating it to be the right and interest of the judgment-debtor in the whole estate. This language might be regarded as specifically stating the object of the sale, *viz.*, an 8 annas 11¼ gundas share in the 16 annas, and the statement as to its being the right and interest of the judgment-debtor as mere description. Section 249 of the Civil Procedure Code, however, provides that the proclamation of sale shall declare that the sale extends only to the right, title and interest of the judgment-debtor in the property specified; and it may be contended that, read in the light of this section, this was the proper meaning of the petition and the certificate. This is the view taken by the original Court. On the other hand, there was much in the character of the previous transactions and the proceedings in the case to justify a more extended meaning. The action was one against the father and manager for a wrongful act affecting the joint estate, and by which the joint family had benefited. The whole share, and not merely Girdhari's interest in it, had been originally charged with the payment of the instalments and interest in violation of this charge, and it was for the profits wrongfully obtained and presumably enjoyed by the joint family that the suit had been brought and the property put up for sale. The interest of the ostensible owners would not unnaturally be supposed to be identical throughout all the proceedings. Though the sale effected was not on a mortgage decree against specific mortgaged property, it arose out of a charge legally imposed upon specific property, and the unlawful breach by the manager of the terms involved in that charge; and thus a purchaser might reasonably be led to believe that the entire property was being put up to sale. As to this, the original Court

observes: 'The circumstances at the time of sale were such as to impress any person not acquainted with the minor plaintiffs' family, with the belief that the entire share aforesaid was the property of the Babu defendant, and it is very probable that upon such belief the first party defendant made the auction purchase; and when the first party defendant enforced the process of delivery of possession, no one even at that time on the part of the minor plaintiffs or Mussumat plaintiff offered opposition, and the absence of such opposition confirmed the first party defendant in his belief. Hence the first party defendant made a *bonâ fide* purchase of the entire share of 8 annas 11¼ gundas in the belief that it belonged to the Babu defendant, and entered upon possession, and the minor and Mussumat plaintiffs, by the omission of an act, allowed that belief which was founded on good faith to stand up to the day of institution of this suit.'

"The Judge goes on to arrive at the conclusion that the plaintiffs and their mother believed, at the time of the sale, that the entire 8 annas 11¼ gundas were being sold, and that in fact it is only owing to the new view taken of such proceedings consequent on the decision of the Judicial Committee of the Privy Council in the *case of Deendyal* that the present claim is advanced. The probability that this was so, is greatly increased by the fact, that though the father persistently disputed the validity of the sale, and carried the case up to the Privy Council, he on no occasion took the point that the minors' share of the property was not affected by it. I must, therefore, conclude, that whatever may have been the ambiguities in the language employed, the interest which the Court intended to sell, and which the purchaser and all others concerned believed that he was buying, was the whole 8 annas 11¼ gundas share, of which Girdhari Singh was ostensible owner, and that, as a fact, the purchaser has, under the sale, been put in actual possession of the whole of that share. This being so, I come to consider the claim of the minor sons to set the sale wholly or partially aside. As regards that part of the plaintiffs' prayer which seeks to have the auction sale of the 9th September 1872 set aside, there is no difficulty in deciding that it ought not to be granted. The doubts which formerly existed in Bengal on this point were removed by the decision in *Deendyal*

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v. *Jugdeep Narain Singh* (1), and *Suraj Bunsi* v. *Sheo Pershad Singh* (2), the result of which cases is to affirm that in Bengal, as in the other Presidencies, the undivided interest of a Mitakshara coparcener in the joint property may be sold in execution of a decree against him for his personal debt. It is less easy to dispose of the contention that the sons' share of the estate was not affected by the execution sale. As to this, it has been pressed upon us that we are concluded by the decision in *Deendyal* v. *Jugdeep Narain Singh* from holding that anything more than the right, title and interest of the judgment-debtor passed in the present instance by the sale. I do not, however, consider that this is the necessary legitimate result of that decision. It is true that it was there held that in the circumstances of the case, the judgment-creditor, purchasing at an execution sale under a money decree obtained against a member of a joint family, had acquired only the right, title and interest of the judgment-debtor; and that if he had wished to go further and enforce his debt against the whole family, he ought to have framed his plaint accordingly, and made the co-sharers parties. I think, however, that the observations in that judgment must be read with reference to the circumstances of the case, and not as laying down an invariable rule that in no case will the co-parceners' interest pass in an execution sale unless they are joined in the suit. Such a view would be in direct contradiction of the rule laid down in *Muddun Thakoor* v. *Kantoo Lal* (3) in the Privy Council and the decisions of this Court which have followed that ruling. I think, therefore, that although there may be cases in which the debt is personal to the father, and the father's interest alone is affected by the decree, there are other circumstances in which the father should be presumed to have been acting on behalf of the family, and the decree accordingly to have been one binding on the joint estate, and that in the absence of words to a contrary effect, the execution sale affects the whole property and not merely the judgment-debtor's interest in it. The present case appears

(1) L. R. 4 I. A., 247; I. L. R. 3 Calc., 198.

(2) L. R. 6 I. A., 88; I. L. R. 5 Calc., 148; 4 C. L. R., 226.

(3) L. R., 1 I. A. 321—14 B. L. R., 187.

to be of this character. The debt was one which *primâ facie* certainly could have been recovered from the sons; the manager was the only ostensible owner, representing the family to the world at large, and it would seem to follow that the interest affected by the execution proceedings should be the interest with which Girdhari Lal was competent to deal, and which was in fact his, so far as liability for his debts, not being immoral, was concerned. Upon the whole, we consider that the sale having been in discharge of the father's antecedent debt, which, accordingly the sons could repudiate only on the ground of its immorality,—the joint family having presumably benefited by the wrongful act which resulted in the decree and execution sale,—the language of the execution proceedings not being inconsistent with the view that the whole estate was sold,—the mistake, if mistake there was, as to the interest passed by the auction sale having been one which the minors' guardian might have prevented and did not prevent, and actual possession of the entire 8 annas 11 gundas having been taken under the sale by the auction-purchaser, we are not now at liberty to set it aside, and declare that the first defendant's possession, so far as the sons' interests are concerned, has been unlawful. We think, that we are bound to follow the rule laid down by the Privy Council in *Ram Sahai* v. *Sheopersad Singh* (1) *viz.*, that, when joint ancestral property has passed out of a family either by a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay such a debt, or in execution of a decree for the father's debt, the sons cannot dispute it except by showing, (1) that the debt was immoral; and (2) that the purchaser had notice of the immorality. This rule was held not to be applicable in that case, and the plaintiffs were allowed to contest the sale on the ground that the purchaser had notice of their claim, but that is not suggested to have been the case in the present instance, and we think that its general principle ought to govern our decision. This view appears to be in accordance with the principles laid down by the Judicial Committee in *Bissesswar Lal Sahu* v. *Luchmeswar Singh* (2),

(1) L. R. 6 I. A. 88; I. L. R. 5 Calc., 148; 4. C. L. R., 226.
(2) L. R., 6 I.A., 233.

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and in *General Manager of the Raj Darbhanga* v. *Maharaj Coomar Ramapat Singh* (1) as to the interpretation to be put on execution proceedings, when the wording leaves room for doubt as to the interest which they affect. I think, accordingly, that this appeal must be admitted, and the plaintiffs' suit should be dismissed with costs throughout."

The suit having been dismissed by the decree of the High Court,

On this appeal, Mr. *R. V. Doyne* appeared for the appellants.

Mr. *J. T. Woodroffe* and Mr. *C. W. Arathoon* for the respondents.

Mr. *R. V. Doyne* for the appellants.—The execution sale did not transfer the entirety of the joint family estate, but only the father's right, title, and interest therein. By the father alone was the debt contracted, on which the decree of April 1872, the cause of the execution sale, was obtained; and the appellants, being then in existence, and consequently co-parceners in the family estate (Mitakshara, Chap. 1, s. 5), jointly with their father, were not made co-defendants in the suit, nor were they parties to the proceedings in execution. The result is that, as in *Suraj Bunsi Koer* v. *Sheopersad Singh* (2), the sale is only good as to the share of the judgment-debtor, and does not affect the shares of the other co-parceners. The decree-holder might attach the interest of the father, bring it to sale, and the purchaser could work out his right by means of a partition; see *Deendyal* v. *Jugdeep Narain Singh* (3). It has not, however, been affirmed by the decisions that the family property is available to satisfy the father's creditor, under whatever circumstances, short of immorality as regards the purpose, the debt may have been contracted. It appears that only in cases where the indebted co-sharer has been sued as the representative of the family, has the sale, when purporting to be only of his right, title, and interest, been allowed to convey the interests of the other members of the family; see *Baijun Doobey* v. *Brij Bookun Lal Awasti* (4) and *Deendyal* v. *Jugdeep Narain Singh* (3).

(1) 14 Moore's I. A. 605; 10 B. L. R. 294.

(2) I. L. R., 5 Calc., 148; L. R., 6 I. A., 88.

(3) I. L. R., 3 Calc., 198; L. R., 4 I. A., 247. (4) L. R., 2 I. A., 275.

And with regard to the words of s. 249 of the Code of Civil Procedure, although the 8 annas 11¼ gundas share was specified in the order for sale, only the right, title, and interest of Girdhari Singh therein should have been understood to be sold.

The opinion was intimated in the judgment in *Sadabart Prasad Sahu* v. *Foolbash Koer* (1) that joint property cannot be followed in the hands of co-parceners to whom it may have passed. But this does not hold good where the obligation upon sons to pay their father's debts, upon his death, arises, and conflicts with the right of survivorship. Or, as expressed in *Girdhari Lal* v. *Kantoo Lal* (2), the ancestral estate, upon the death of the father, is not exempted in the hands of the son from liability to pay the father's debt, which it is the son's pious duty to pay; and see *Muttayyan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (3). But the responsibility of the joint estate seems to have been maintained only where the father as manager, or *karta*, for the family, has charged upon it a debt incurred for the family benefit; or the debt, at all events, is of that character; or where, at the father's death, sons have the pious duty of paying the father's debt out of their shares in the ancestral estate, the father's own share being insufficient to meet it. None of these cases has arisen here. The debt in its inception was the debt of the father alone, he having borrowed money. That the family profited by his acts, such as the ouster which materially added to his debt, has not been made out. The result is that the debt cannot be taken as a family debt, and the only ground on which the judgment of the High Court could be maintained would be that a father contracting debts, however imprudently, provided that his purpose was not immoral, could render liable the shares in ancestral property already vested in his sons. It accords with the decisions that the father's share in such a case should be sold; and that the *onus* should be thrown on the purchaser at an execution sale in satisfaction of a decree against the father, to make due inquiry whether the property specified for sale is so held as to be liable to sale

(1) 3 B. L. R., (F. B.), 31.
(2) L. R., 1 I. A., 321; 14 B. L. R., 187.
(3) L. R., 9 I. A., 128; I. L. R., 6 Mad., 1.

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in satisfaction of the decree, appears to follow from the application of the principles on which *Hanuman Persad Panday* v. *Babooee Munraj Kooer* (1) was decided.

The appellant's case is strongly supported by the decision in *Deendyal* v. *Jugdeep Narain Singh* (2). There, as here, the proceedings had been taken against the father alone, and there it was held that the purchaser at the execution sale could not have acquired more than the interest of the judgment-debtor; and it was pointed out, in the judgment, that if the creditor had sought to enforce his debt against the co-sharers, who were not parties to the transaction giving rise to the debt, and if he had sufficient basis of claim against them, he ought to have framed his suit accordingly. That equally applies to the present case.

Reference was also made to the *Collector of Monghyr* v. *Hardinarain Sahu* (3); *Hardinarain Sahu* v. *Ruderperkash Misser* (4). As to the rights of a mother on a partition, and as to the proportionate shares taken by the father and sons, questions subordinate to the main one, were cited, Mitakshara, Chap. I, s. 2, v. 8, and s. 5; Vivada Chintamoni, edit. Prosonno Kumar Tagore, 1863, p. 230; Colebrooke's Digest, books 5 and 6; Strange's Hindu Law, Chap. 9; Mayne's Hindu Law and Usage, Chap. XV.; *Mahabir Persad* v. *Ramyad Singh* (5).

Mr. *J. T. Woodroffe* and Mr. *C. W. Arathoon* for the respondents.—The estate has been treated as ancestral, but the circumstances under which Girdhari Singh obtained his share in Mouzah Lalpur Bhatkera might have to be considered on the question, whether it is ancestral, if it were raised: see *Mohabir Koer* v. *Joobha Singh* (6). The first, and main point is that the whole family estate is liable, because the debt, contracted for no immoral purpose, is due by the father of the family, living under the Mithila law, on this point identical with the Mitakshara. This supports the sale of the family estate in

(1) 6 Moore's. I. A. 424.

(2) I. L. R., 3 Calc., 198; L. R., 4 I. A., 247.

(3) I. L. R., 5 Calc., 425.

(4) I. L. R., 10 Calc., 626.

(5) 12 B. L. R., 90; 20 W. R. 192.

(6) 8 B. L. R., 38; 16 W. R., 221.

satisfaction of the decree upon the father's debt. It may, however, be taken as a second ground, that the father here was manager of the family estate, and represented the sons' interests; the family, also, profited by the money, and had the temporary benefit of the rents and profits after the ouster. It has been found, moreover, by both Courts that the family estate was understood to be sold. The nature of the debt contracted by the father will govern the question what was liable to be sold, whether the whole, or only the father's share. The order for sale comprises the whole estate; but it is not the construction of the order, and of the written proceedings, that will determine the question. It is the general principle that a Hindu son is liable for his father's debt to the extent of the ancestral estate, which comes to the son, under the Mitakshara at his birth, and under the Dayabhaga at his father's death; provided always that the debt has not been contracted for an immoral purpose. Practically, the result of the decisions in Bengal, as to the effect of attachment of family property for sale in execution of a decree against the father, is much the same as in the other provinces. For Madras decisions see *Ponnappa Pillai* v. *Pappuvayyangar* (1), cited with approval by this Committee in *Muttayyan Chettiar* v. *Sangili Vira Pandia Chinnatambiar* (2). In Bengal the principle which was declared in *Janak Kishour Koonwar* v. *Roghoonundun Singh* (3) by the Sadr Court in 1861, appears again in the judgment in *Hanuman Persad Panday* v. *Babooee Munraj Kooer* (4) and is declared in *Girdhari Lal* v. *Kantoo Lal* (5); and is, briefly, that exemption of the son's estate from liability for the father's debt is founded upon the nature of that debt.

The difference between the Bengal decisions and those of Madras and Bombay seems only to be that, according to the first, the son's interest in the family estate is *primâ facie* bound by a decree for debt against the father, although if the son has not been made a party to the suit, or proceedings against the father,

(1) I. L. R. 4 Mad., 1.

(2) I. L. R. 6 Mad., 1; L. R., 9 I. A., 128.

(3) S. D. A., 1861, p. 213.

(4) 6 Moore's I. A., 421. (5) L. R. 1 I. A., 321; 14 B. L. R., 187.

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he may question the decree upon any ground upon which he could have contested it, if he had been joined; one ground being that the debt was incurred for an immoral purpose. The Courts in Madras have held that the son's share is always bound, unless he shows that the debt has been incurred for an immoral purpose. And in Bombay the same liability attaches to the son's estate, see the judgment of Westropp, C.J., in *Udaram Sitaram* v. *Rana Panduji* (1).

The decision in *Deendyal* v. *Jugdeep Narain Singh* (2), on which reliance is placed for the appellant's case, only in effect comes to this,—that whatever may be the distinction between the rights of a purchaser under a conveyance from a co-parcener, holding a share in joint property, and the rights of a purchaser at an execution sale of a co-parcener's rights, the purchaser, at a sale in execution of decree, acquires all the right to compel the same partition which the judgment-debtor might have compelled, if minded so to do, when he was situated as he was before the decree against him.

Upon the second ground, that the father being head of the family, and *karta*, may bind it; see *Deva Singh* v. *Ram Monohur* (3), *Ram Narain Lal* v. *Bhawani Prasad* (4), and these cases show that the interests of the rest of the family are not exempt from liability. It is the remedy of the sons that they may sue to prevent their father from wrongfully dealing with the estate; but they are not co-equal with him as regards authority to deal with others concerning it, and the father has authority over them. The father's position in his capacity of representative of the estate must be put on a level, as regards execution for debts due from the family, with that of a widow representing the family estate. For the effect of the sale of her right, title, and interest in execution of a decree, where she represents, not only her own interest for life, but the estate at large, see *Jugolkisor* v. *Jotindro Mohun Tagore* (5), and the *Court of Wards* v. *Maharaja Coomar Ramaput Singh* (6).

(1) 11 Bom. H. C., 76.
(2) I. L. R. 3 Calc., 198; L. R. 4 I. A., 217.
(3) I. L. R. 2 All., 751.
(4) I. L. R. 3 All., 443.
(5) I. L. R. 10 Calc., 985; L. R. 11 I. A., 66.
(6) 14 Moore's I. A., 605; 10 B. L. R., 294.

And the father, though the only person named in a transaction, may be shown to have acted as the representative of the family; see *Baso Koer* v. *Hurry Das* (1). The sale in this case was not merely of the personal interest of the father, but of his interest as representing the family. See W. H. Macnaghten's note to Case III in the Precedents; Principles and Precedents of Hindu Law, Chap. XI, of Sale, Case III.

Reference was also made to *Sheoprosad* v. *Jung Bahadur* (2); *Umbica Prosad Tewari* v. *Ram Sahai Lal* (3); *Laljee Sahi* v. *Fakeerchund* (4); *Mudden Gopal Lal* v. *Gowrunbutty* (5); *Ramblunjun Singh* v. *Mundur Kooer* (6); *Ram Nagra Singh* v. *Kishen Kishore Narain* (7).

Their Lordships having intimated that they would decide the main point first, without hearing the respondents upon the minor points before the former had been disposed of, Mr. *R. V. Doyne* replied.

On a subsequent day (December 18th) their Lordships' judgment was delivered by

LORD HOBHOUSE.—This is one of the cases, frequently occurring of late years, which raise questions as to the circumstances under which ancestral estate of a family subject to the Mitakshara law becomes liable to answer the debts of the head of the family.

This family is one governed by the Mithila law, which, on the point under consideration, does not differ from the Mitakshara. Its head was one Girdhari Singh. He had a wife, the appellant Nanomi Babuasin, and two sons, the other two appellants, who were born before the transactions which gave rise to this suit, and were minors when this suit was commenced. The family are, or were, possessed of valuable ancestral property in land.

In the year 1870 one Mrs. Collis, complaining that Girdhari had wrongfully ousted her from land held under lease from him, sued him to recover possession and mesne profits. The lease had been granted as part of an arrangement under which Girdhari took a loan of Rs. 45,000 from Mr. Collis, the predecessor

(1) I. L. R. 9 Calc., 495.
(2) I. L. R. 9 Calc., 389.
(3) I. L. R. 8 Calc., 898.
(4) I. L. R. 6 Calc., 135.
(5) 15 B. L. R. 264; 23 W. R., 365.
(6) 23 W. R., 127.
(7) 23 W. R., 266.

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in title of Mrs. Collis. On the 10th April 1871 a decree was made according to the prayer of Mrs. Collis' plaint, and the sum of Rs. 32,318 was awarded to her for mesne profits.

On the 9th of September 1872 a portion of the family ancestral land was brought to sale by execution proceedings in satisfaction of the decree, and the respondent Hardi Narain became the purchaser. The property sold was described as "8 annas 11¼ gundas out of the entire 16 annas, the right and interest of the judgment-debtor in mouzah Rampur Bhatkera." The fraction mentioned was the share of the whole of Girdhari's joint family, the remaining annas and gundas belonging to some relatives who were separate in estate. A dispute arose as to the regularity of the sale, which led to further litigation; but in the result the sale was upheld and Hardi Narain took possession, which he still retains.

In September 1878 the present suit was brought by the appellants against Hardi Narain and Girdhari. They pray that either the sale to Hardi Narain may be wholly set aside, or that they may recover possession of the land, and that Hardi Narain may be put to take proceedings for partition. They contend, first, that nothing passed by the sale except such share as Girdhari would have taken on partition; and, secondly, that he would only have taken one-fourth part.

The Subordinate Judge of Bhagulpur agreed with the appellants on the first point, but differed on the second. He was of opinion that, by the Mithila law, the wife, having had a provision made for her, would take no share on partition, and that the father would take a double share. He therefore gave the appellants a decree for a moiety of the estates in suit. In deciding for the first contention, the Subordinate Judge founded himself on *Deendyal's case* (1). In his opinion, as Mrs. Collis sued Girdhari alone, she did not intend her decree to extend over the entire property of the joint family. And on the same grounds he construed the language used to describe the property in the execution proceedings as though it meant nothing more than the coparcenary interest of Girdhari.

(1) L. R., 4 I. A., 247; I. L. R., 3 Calc., 198.

Both parties appealed to the High Court, who were of opinion that the whole interest of the family passed to Hardi Narain by the sale, and ordered that the suit should be dismissed with costs. The Court considered that the interest which all parties believed that Hardi Narain was buying was the whole 8 annas 11 gundas into possession of which he was actually put. As regards *Deendyal's case*, they held that it does not lay down an invariable rule that in no case will the coparceners' interest pass in an execution sale unless they are joined in the suit. And they point out that in *Muddun Mohun's case* (1) a different rule was laid down; and that in *Suraj Bunsi's case* (2) a statement was made of the effect of the then decisions on the subject which embodied the principle of *Muddun Mohun's case*. The present appeal is brought from the decree of the High Court.

There is no question that considerable difficulty has been found in giving full effect to each of two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible to say that the decisions on this subject are on all points in harmony, either in India or here. But the discrepancies do not cover so wide a ground as was suggested during the argument in this case.

It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority.

(1) L. R. 1 I. A., 321; 14 B. L. R., 187. (2) L. R. 6 I. A., 85; I. L. R. 5 Calc. 148.

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The circumstances of the present case do not call for any inquiry as to the exact extent to which sons are precluded by a decree and execution proceedings against their father from calling into question the validity of the sale, on the ground that the debt which formed the foundation of it was incurred for immoral purposes, or was merely illusory and fictitious. Their Lordships do not think that the authority of *Deendyal's case* bound the Court to hold that nothing but Girdhari's coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in *Deendyal's case* there certainly was an ambiguity of that kind), the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings.

That brings their Lordships to consider the nature of the debt in this case. There was a great deal of discussion whether the debt originated in the loan of Rs. 45,000, or in Girdhari's receipt of the mesne profits for which the decree was given. It appears to their Lordships that the new debt for which the decree was made is the foundation of the sale. But, whichever it was, they think the High Court are clearly right in holding that it must be taken as a joint family debt. The Subordinate Judge does not give any opinion on this point. If it is a joint family debt, a sale to answer it, effected either by Girdhari or in a suit against him, cannot be successfully impeached.

There remains only the question whether anything more than the father's coparcenary interest was bargained for, paid for, and taken

possession of by the purchaser. On this point, their Lordships are clearly of opinion that the High Court have decided rightly. Indeed the Subordinate Judge did not decide otherwise, so far as the facts go. As before mentioned, he held that only the coparcenary interest passed, because of the effect he ascribed to *Deendyal's case.* But he was clear that the language of the execution and sale proceedings was such that the purchaser must have thought that he was buying the entirety. It is equally clear that all parties thought the same.

The purchaser, therefore, has succeeded in showing that he bought the entirety of the estate, which could lawfully be sold to him, and the suit fails upon the merits. Their Lordships will humbly advise Her Majesty to dismiss this appeal, and the appellants must pay the costs.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitor for the respondent, Modun Mohun: Mr. *T. L. Wilson.*

C. B.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Pigot and Mr. Justice Trevelyan.

1886 *April* 3.

WALLIS AND OTHERS (PLAINTIFFS) *v.* TAYLOR (DEFENDANT.)*

Small Cause Court Presidency Towns Act (XV of 1882), *s.* 18—*Jurisdiction—Army Act of* 1881 (44 & 45 *Vic, c.* 58), *ss.* 148, 151—*Leave to sue.*

The jurisdiction given to Small Cause Courts by Act XV of 1882 is not affected by 44 & 45 Vic., c. 58, s. 151.

THIS was a reference from the Calcutta Court of Small Causes.

The facts of the case were that the plaintiffs, who had obtained leave to sue under s. 18 of the Small Cause Court Act of 1882, brought a suit in the Calcutta Court of Small Causes against the defendant, who was a lieutenant in the 45th (Rattray's) Sikhs and who was then stationed at Quetta, to recover Rs. 320-15-9 for goods sold and delivered. It was admitted that there was a Court of Small Causes in Quetta.

* Small Cause Court Reference No. 4 of 1885, made by H. Millett, Esq., Chief Judge of the Court of Small Causes at Calcutta, dated the 2nd of May 1885.

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The defendant contended, with reference to the Army Act of 1881, that the Calcutta Court of Small Causes had no jurisdiction over an officer on duty outside Calcutta, in respect of suits of a less value than Rs. 400.

On the new trial out of which this reference arose the learned Judges differed in opinion on the question of jurisdiction. The Chief Judge, after stating his opinion of the effect of ss. 148 and 151 of the Army Act of 1881, and stating that it had been contended before the Court that the words "shall be cognizable" in s. 151 meant "shall be cognizable only," and that the whole spirit of the Act was to give to officers the privilege of being sued in the places where they may be serving, was of opinion that there was a marked distinction between section 148 and section 151 which led to the belief that the legislature did not intend to place the same restriction on matters coming within the purview of section 151 as it did on those coming within that of section 148: section 148 using the words "shall be cognizable before a Court of Requests . . . and not elsewhere," thus excluding the jurisdiction of all other Courts, section 151 using the words "shall be cognizable by such Court to the extent of its powers," the words "not elsewhere" being omitted, thus showing that the legislature did not intend to interfere where there might be a jurisdiction common to two Courts of Small Causes.

The Officiating Fourth Judge was of opinion that the Court of Small Causes referred to in s. 151 of the Army Act was the Court within the jurisdiction of which the defendant resided, and that there being a Court of Small Causes in Quetta the suit should have been brought there.

The learned Chief Judge, therefore, referred to the High Court the question, whether the Calcutta Court of Small Causes had jurisdiction in the matter?

Mr. *Pugh*, for the plaintiffs, contended that the jurisdiction of the Small Cause Court was not excluded by the Army Act of 1881; that s. 151 of that Act referred to personal jurisdiction; and that the suit had been rightly brought, after leave obtained under s. 18 of Act XV of 1882, in the Small Cause Court.

No one appeared for the defendant.

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The opinion of the High Court was delivered by

PIGOT, J.—It appears to us clear that the Small Cause Court has jurisdiction in such a case as the present.

By the Small Cause Court Act, jurisdiction is expressly conferred on Small Cause Courts, in cases the facts of which are such as those appearing here; and all that has to be considered in this case is, whether there is any provision in the Army Act of 1881 which takes away that jurisdiction.

We are of opinion that there is none. The doubt which has been felt in the matter arises from its being apparently supposed, that the words "shall be cognizable" in s. 151 of the Army Act, mean "shall be cognizable only."

We are of opinion that there is nothing in that section of the Army Act, either in express words or by reasonable inference, to lead us to believe that it was the intention of the legislature in that section to affect the jurisdiction of the Small Cause Courts. We therefore answer the question referred to us in the affirmative.

We think it desirable to add that the discretion of the Small Cause Courts in giving leave to sue under s. 18 of Act XV of 1882 is one that ought to be only very cautiously exercised, in cases such as the one before us.

Attorneys for the plaintiffs: Messrs. *Sanderson & Co.*

T. A. P.

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

KRISTO BHABINEY DOSSEE (PLAINTIFF) *v.* ASHUTOSH BOSU MULLICK AND ANOTHER (DEFENDANTS.)*

1886 *May* 12.

Hindu Law—Partition—Widow's Share.

The plaintiff, the widow and heiress of one *N*, brought a suit for partition of the estate of one *R* (her late husband's father) against *A*, a son of her late husband's half-brother, and *K* the widow of *R*, the parties to the suit being the only members of the family then alive.

Held, that *A* took a one-half share in the estate, the other half share being divisible between the widow of *R* and the widow of *N*. *Cali Churn Mullick* v. *Janova Dossee* (1) followed.

* Original Civil No. 63 of 1886.

(1) 1 Ind. Jur. N. S., 284.

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KRISTO BHABINEY DOSSEE v. ASHUTOSH BOSU MULLICK.

THIS was a suit brought by one Kristo Bhabiney Dossee, the widow of one Nilmadhub Bosu Mullick, for partition of a house and premises formerly belonging to one Ram Chunder Bosu Mullick, the father of her late husband.

The following table shows the position of the parties to the suit:—

RAM CHUNDER BOSU MULLICK.

m. 1 DOORGA MONEY DOSSEE died 1836
m. 2 KRISTO MONEY DOSSEE, defendant.

BY FIRST WIFE — BY SECOND WIFE.

PREONATH BOSU MULLICK m. MOKHODA DOSSEE — ASHUTOSH BOSU MULLICK Defendant.

NILMADHUB BOSU MULLICK m. KRISTO BHABINEY DOSSEE Plaintiff.

The members of the family alive at the date of suit were Kristo Bhabiney Dossee (the plaintiff), Ashutosh Bosu (defendant No. 1) a grandson of Ram Chunder Bosu Mullick by his first wife, and Kristo Mohiney Dossee (defendant No. 2) the widow of Ram Chunder Bosu Mullick.

The plaintiff sought partition of the house hereafter mentioned and stated that Ram Chunder Bosu Mullick died in 1856, leaving him surviving two sons by different wives, *viz.*, Preonath Bosu Mullick by his first wife, and Nilmadhub Bosu Mullick by his second wife Sreemutty Kristo Mohiney Dossee; that Ram Chunder was at his death possessed of a certain house situate at No. 94, Hurry Ghose's Street in Calcutta; and that after his death Preonath Bosu Mullick and Nilmadhub Bosu Mullick inherited this house, enjoying it in equal shares up to the date of their respective deaths.

That Preonath Bosu Mullick died on the 23rd November 1872, intestate, leaving him surviving a son named Ashutosh Bosu Mullick, and a widow named Sreemutty Mokhoda Dossee; that Nilmadhub Bosu Mullick died on the 29th July 1875, intestate, and without issue, leaving a widow Kristo Bhabiney Dossee as his sole heiress.

The suit as originally framed was brought against Ashutosh Bosu Mullick alone, but subsequently Kristo Mohiney Dossee, the widow of Ram Chunder Bosu Mullick, applied to be added as a party defendant, and the Court, on the authority of the case

of *Torit Bhushun Bonnerjee* v. *Taraprosunno Bonnerjee* (1) made an order directing her to be added as a party.

The defendants were all willing that a partition should take place, and the only matter discussed at the hearing was as to the shares to be allotted to the different parties.

Mr. *Handley* for the plaintiff referred to the decree in the case of *Torit Bhushun Bonnerjee* v. *Taraprosunno Bonnerjee* and relied on the way in which the decree in that suit had directed the property to be divided into four parts, allotting to the plaintiff and Taraprosunno, and the committee of Kaliprosunno each a one-fourth share, and to the two widows the remaining fourth share between them; but pointed out to the Court the case of *Cali Churn Mullick* v. *Janova Dossee* (2) which was against him.

Mr. *Sale* for Kristó Bhabiney Dossee.

Ashutosh Bosu Mullick appeared in person.

TREVELYAN, J.—I do not think that there is in reality any conflict of authority in this case. Mr. Justice Phear's decision in *Cali Churn Mullick* v. *Janova Dossee* (2) was based upon three decisions of the Supreme Court. Mr. Justice Phear's decision seems to have been accepted as an authority with regard to the Bengal school of law in the recent case of *Damoodur Misser* v. *Senabutty Misrain* (3). According to Mr. Justice Phear's decision, in a partition between sons by different wives, the respective mothers are only entitled to share equally with their own sons, the aggregate of the shares which an equal division among the brothers allots to those sons, or in other words, the property must be first divided into as many shares as there are sons. Each widow then shares equally with each of her sons the portion allotted to her sons. I have been referred to a decree passed by Mr. Justice Wilson on the 21st of July 1880 in a case of *Torit Bhushun Bonnerjee* v. *Taraprosunno Bonnerjee*. In that case one Dhurm Das Bonnerjee left him surviving the plaintiff, two other sons, and two widows, one of them the mother of the plaintiff, and the other the mother of the two other sons. Mr. Justice Wilson ordered the property

(1) I. L. R., 4 Calc., 756.
(2) 1 Ind. Jur., 284.
(3) I. L. R., 8 Calc., 542.

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to be divided into four parts, giving one of such parts to each of the three sons, and the fourth part to the two widows.

In that case, however, it does not appear that there was any contest or argument.

I think that I must follow Mr. Justice Phear's decision, and declare that the male defendant is entitled to a half share of the property.

As I understand it, the plaintiff does not dispute the right of her mother-in-law to a share on partition. The other half will therefore be divided between the plaintiff and the female defendant in equal shares.

Suit decreed.

Attorneys for plaintiff: Messrs. *Harris & Simmons.*

Attorney for second defendant: Baboo *Nobodeep Chunder Roy.*

T. A. P.

Before Mr. Justice Trevelyan.

1886 *May* 25.

BIPIN BEHARY DAW (PLAINTIFF) *v.* SREEDAM CHUNDER DEY (DEFENDANT.)*

Evidence Act (I of 1872), *s.* 32, *cl.* 5 *and ill.* (*l.*)—*Hearsay Evidence—Pedigree—Proof of birth—Statement of deceased father.*

In a suit on a promissory note, to which the only defence was minority, a statement made by the defendant's father, (who died before proceedings by way of suit had been contemplated) to a witness as to the age of his son, *held* to be inadmissible as evidence of the age of the defendant in support of his defence.

THIS was a suit brought on a promissory note. The only defence was that the defendant was a minor at the time the note was signed.

During the course of the defendant's case, one Motilall Day was called as a witness and deposed as follows: "I took Sreedam in 1876 to the Metropolitan Institute for the purpose of getting him admitted. . . . . I did not know personally what Sreedam's age was when I took him to the Institute; whilst there his age was mentioned. At the time of his admission a statement of his age was given to me by his father."

Sreedam's father admittedly died after this event and before legal proceedings had been contemplated.

* Suit No. 331 of 1885.

Q by Mr. *Mittra* (defendant's Counsel).—What did his father say?

Mr. *M. P. Gasper* objected.

Mr. *Mittra* contended that the question was admissible under s. 32, cl 5 and illustration (*l.*) of the Evidence Act.

TREVELYAN, J.—I think the question is inadmissible: I do not think the statement of the father as to the date of the son's birth is evidence. Illustration *(l)* to s. 32 would be material in cases of pedigree; but the rule which admits hearsay evidence in pedigree cases is confined to the proof of the pedigree, and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage when they have to be proved for other purposes. *See Haines* v. *Guthrie* (1).

This question does not come under para. 5 of s. 32 or any other paragraph of that section.

Attorney for plaintiff: Baboo *Bolye Chund Dutt.*

Attorneys for defendant: Messrs. *Bose & Bose.*

T. A. P.

REFERENCE FROM THE BOARD OF REVENUE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Pigot and Mr. Justice Trevelyan.

In re THE KONDOLI TEA CO., LD.*

1886 *April* 3.

Stamp Act (I of 1879), *Art.* 21, *Sch. I.—Conveyance by vendors under one denomination to the same persons purchasers under another denomination.*

Eight persons, the owners of a tea estate, purported to convey their rights in the estate to a Company; the consideration expressed in the deed of conveyance being £43,320, payable in shares and debentures of the Company taken at *par.*

The only shareholders or debenture-holders of the Company were the eight persons who purported to sell the estate to the Company.

Held, that, although the conveying parties were the shareholders of the Company, there was just as much a sale and transfer of the property and a change of ownership as there would have been if the shareholders had been different persons; and that the proper duty payable on the conveyance was therefore that mentioned in Art. 21, Sch. I of the Stamp Act.

* Reference No. 1 of 1886 under s. 46 of the Stamp Act, made by C. A. Samuells, Esq., Offg. Secretary to the Board of Revenue, dated the 18th of February 1816.

(1) L. R., 13 Q. B. D., 818.

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IN RE THE KONDOLI TEA CO., LD.

REFERENCE to the High Court under s. 46 of Act I of 1879.

On the 8th October 1885 the attorneys of the Kondoli Tea Co. presented to the Collector of Stamps for adjudication of stamp duty, under s. 30 of the Stamp Act, an unexecuted deed of assignment of a tea estate, called the Nowgong Tea Estate, purporting to be made between E. D. Wylie of the first part, W. P. Mackinnon of the second part, W. Mackinnon, P. Mackinnon, D. Mackinnon, N. Mackinnon, T. M. Russell and William Peddie Alexander of the third part; J. Macalister Hall of the fourth part; Thomas Henderson of the fifth part, and the Kondoli Tea Company, Ld., of the sixth part.

The consideration for this assignment from the 1st, 2nd, 3rd, 4th, and 5th parties to the Company was stated to be £43,320 of which a portion was to be paid in debentures of the Company and the remainder in shares in the capital stock of the Company; there being no actual cash payment of any portion of the intended purchase money.

The only shareholders and debenture-holders in the Kondoli Tea Co., Ld., were the individuals who purported to sell the property, and it was, therefore, submitted that the only effect of the conveyance would be that the nominal ownership in the property would be changed, the actual beneficial interest still belonging to the vendors in their character of debenture-holders and shareholders of the Company; and that it was not the intention of the legislature that a nominal transfer of this description should be subject to an *ad valorem* duty calculated on a nominal price.

The Collector submitted the case through the Commissioner of the Presidency Division to the Board of Revenue, expressing his opinion that the instrument was an intended conveyance of a tea estate as a going concern; the consideration £43,320 intended partly to be paid in capital stock and partly in debentures of the Company; and that, therefore, on the authority of *In re Menglas Tea Estate* (1), the deed was chargeable with *ad valorem* duty of Rs 4,335.

The Board of Revenue were of opinion that, so long as the transfer was one between the existing owners under one denomination, to the same persons only under different nomenclature,

(1) I. L. R., 12 Calc., 383.

the document could not properly be considered as a conveyance, and that, therefore, the duty payable on it was that laid down under Art. 60(*b*) of Sch. I. of the Stamp Act; they however referred the question to the High Court.

Mr. *Stokoe* for the Company.—The instrument is not a conveyance on sale as defined in s. 3 of the Stamp Act; it is merely a transfer of property. In *Denn* v. *Diamond* (1), Holroyd, J., says: "A sale imports a *quid pro quo* enuring to the party selling." In that case the form of the document was that of a deed of sale, but the Court held it was not a purchase by the son. The form of a document is not a sufficient basis to go upon in determining the character of an instrument; the interest we get in the land as a Company is the same as we had in it in our private capacity. In *Christie* v. *Commissioners of Land Revenue* (2), Kelly, C. B., says: "The substance of a transaction is alone to be considered upon the question whether an instrument is liable to stamp duty." In *the matter of the Maharajah of Durbhunga* (3), the Court in determining the questions raised followed this rule. The case of *Ex parte Hill* (4) is one under s. 7 of the Stamp Act. In *re The Port Canning Co., Ld.* (5), it is decided that no *ad valorem* duty is payable upon a conveyance where the consideration consists of shares in a public Company. Section 21 of the Stamp Act might meet this case.

The case of a *Reference under Stamp Act, s.* 46 (6), is distinguishable; it is no authority in the face of the cases cited above.

The *Advocate-General* (Mr. *Paul*) for the Crown was not called upon.

The opinion of the Court was delivered by

PETHERAM, C.J.—The question in this case is, whether a document carrying out a particular transaction is a conveyance within the meaning of the definition contained in clause 9 of s. 3 of the Stamp Act, and within the meaning of Art. 21 of Sch. I of that Act.

(1) 4 B. & C., 243.
(2) L. R. 2 Exch. 46.
(3) I. L. R. 7 Calc., 21.
(4) I. L. R. 8 Calc., 254.
(5) 16 W. R., 208.
(6) I. L. R. 7 Mad. 350.

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The document, upon the face of it, professes to be a conveyance of a tea garden from eight gentlemen to the Kondoli Tea Company, Limited, in consideraiton of £43,320, the said consideration being payable in shares and debentures of the Company taken at *par*.

It is said that that is not what the real transaction is; because the only shareholders in the Kondoli Tea Company are the eight gentlemen who conveyed the estate, and that therefore it was not really a conveyance or transfer by way of sale, but a mere handing over of the property from them in one name to themselves under another name.

I think that is a fallacy. Whoever the shareholders in the Kondoli Tea Company, Limited, were, I think the Kondoli Tea Company, Limited, was a separate person, a separate body, and a conveyance to the Kondoli Tea Company, Limited, of property which was the property of the sharers in their individual capacity, was just as much a conveyance, a transfer of the property as if the shareholders in the Company had been totally different persons.

This is the only thing that I think it necessary for us to say in giving judgment, namely, that, in my opinion, the Kondoli Tea Company, Limited, is a separate body; and for the purpose of seeing what their transactions are, I do not think it is possible to look at the Register of Shareholders to ascertain who the shareholders were; and, consequently, although the conveying parties here were the shareholders of the Company, there was just as much a sale and transfer of the property and a change of ownership as there would have been if the shareholders had been different persons.

I, therefore, think that the proper stamp to be put upon this document is the *ad valorem* stamp mentioned in Art. 21 of Sch. I of the Stamp Act, and that it must be calculated on the amount of the consideration mentioned in the instrument.

Attorneys for the Company: Messrs. *Barrow & Orr.*

Attorney for the Crown: The *Government Solicitor*, Mr. *R. L. Upton.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

JANAKI BALLAV SEN (ONE OF THE DEFENDANTS) *v.* HAFIZ MAHOMED ALI KHAN AND OTHERS (PLAINTIFFS) AND ANOTHER (DEFENDANT.)*

1886 *March* 23.

Certificate of Administration—Act XXVII of 1860—*Right to recover debts of deceased person.*

Where payment of a debt is not being withheld for fraudulent or vexatious motives, but from a reasonable doubt as to the party entitled to it, the person desirous of recovering the amount of the debt is bound to produce a certificate under Act XXVII of 1860 before he can obtain a decree, or execute a decree already obtained by the deceased; though he may institute his suit, or apply for execution without such certificate, provided a certificate is filed before decree or before execution issues.

THE facts of this case, as far as they are material to this report, were as follows:—

On 9th Aghran 1277 (23rd November 1870), defendant No. 2 executed in favor of his father-in-law, one Sadat Ali Khan Saheb, a mortgage bond for Rs. 30,000 to be repaid without interest in ten yearly instalments of Rs. 3,000 each. In default of payment interest was to run at the rate of 1 per cent. per mensem till realization. Payments were to be made by hundis, and to be entered on the back of the bond.

On 10th Aghran 1277 (24th November 1870), *i.e.*, on the following day, an ijara lease of the mortgaged properties was executed by defendant No. 2 in favor of Sadat Ali at an annual rent of Rs. 3,000, payable in two instalments of Rs. 1,500 each, and on 11th Aghran 1277 (25th November 1870), a dur-ijara of the same properties was granted by Sadat Ali to Ram Nath Singh at an annual rent of Rs. 3,600, payable in two instalments of Rs. 1,800 each. It was admitted that Ram Nath Singh was in reality the servant and benamidar of defendant No. 2.

On 24th Assar 1286 (17th June 1879), defendant No. 2 executed a second mortgage of the same properties (together with other

* Appeal from Original Decree No. 97 of 1885, against a decree of Baboo Nobin Chunder Ganguli, Rai Bahadoor, Subordinate Judge of Rungpore, dated the 29th of December 1884.

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properties) in favor of defendant No. 1, who, having obtained a decree upon his bond, brought the properties to sale, and himself purchased them.

The present suit was brought by the heirs of Sadat Ali Khan upon the bond of 9th Aghran 1277 for the sum of Rs. 30,000 as principal, and Rs. 24,600 as interest, on the allegation that nothing whatever had been paid.

Defendant No. 2 admitted the execution of the bond, and that he had not paid anything in liquidation thereof. Defendant No. 1, the second mortgagee and auction-purchaser of the mortgaged properties, pleaded that the first mortgage had been liquidated by the execution of the ijara and dur-ijara, which substituted an annual payment of Rs. 3,600 for ten years, in lieu of principal and interest, and that such payments had in fact been made. He also objected that the plaintiffs were not the sole heirs of Sadat Ali, and that they had not obtained a certificate under Act XXVII of 1860 empowering them to realize the debts due to the estate of the deceased.

The Subordinate Judge who tried the suit found that the plaintiffs were bound either to produce a certificate under Act XXVII of 1860, or to show that they were the only heirs, and that they had not done so. On the merits he came to the conclusion that nothing had been paid upon the bond, and he, therefore, gave the plaintiffs a decree for their entire claim, to be realized in the first instance by the sale of the mortgaged properties, and in the event of the sale proceeds of such properties being insufficient, by the sale of other properties belonging to defendant No. 2. But coupled with his decree was an order directing that the plaintiffs should not be entitled to execute it unless and until they produced a certificate under Act XXVII of 1860.

From this decision the first defendant appealed.

Mr. *Evans*, Baboo *Mohini Mohun Roy*, Baboo *Guru Das Banerjee*, and Baboo *Mokoond Nath Roy*, for the appellant.

Mr. *Woodroffe*, Baboo *Srinath Das*, and Baboo *Jogesh Chandra Roy*, for the respondents.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) so far as is material to this report, continued (after stating the facts as above) as follows :—

Now the first point taken in appeal is that this order of the lower Court is wrong. It is contended that under s. 2 of Act XXVII of 1860, no decree should have been made without production of a certificate, especially as the plaintiffs had failed to establish that they were the sole heirs of Sadat Ali.

In making the order referred to the Subordinate Judge has relied on the case of *Luchmin* v. *Gunga Pershad* (1), but that decision only goes so far as to lay down that in certain exceptional cases, provided for by the Statute, a suit may be instituted and decreed without the production of a certificate. In the case of *Hati Lall* v. *Hurdeo* (2), it was similarly held that a certificate was not imperatively necessary in every case before the execution of a decree could be taken out, but that when the judgment-debtor objects to the title of the person claiming to execute the decree, the Court should consider whether the objection is *bonâ fide* or vexatious. It is not alleged that in the present case payment is being withheld from fraudulent or vexatious motives. In the case of *Tarini Pershad Ghose* v. *Gungadhur* (3), it was held that the production of a certificate was necessary before a decree in favor of a deceased person could be executed by a person claiming to be his heir. In the case of *Shodone Mohaldar* v. *Halalkhore Mohaldar* (4), the guardian of a minor sued to recover upon a bond which he alleged had been devised to the minor by the deceased, and it was held that such a suit would not lie unless probate of the will were taken out, or unless the guardian had obtained a certificate under Act XXVII of 1860. In that case it was distinctly held that the Subordinate Judge was wrong in making a decree, such as has been made in this case, that is to say, a decree coupled with a condition that it shall not be executed without the production of a certificate.

In *Chunder Coomar Roy* v. *Gocool Chunder Bhuttacharjee* (5), a similar view was held, though an expression of opinion was at the same time thrown out, that possibly a suit might be instituted before a certificate was actually obtained, if such certificate was subsequently produced at the trial.

(1) I. L. R., 4 All., 485.
(2) I. L. R., 5 All., 212.
(3) 6 W. R. Mis., 34.
(4) I. L. R., 4 Calc., 645.
(5) I. L. R., 6 Calc., 370.

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Rulings to this effect are to be found in *Ramakristna Moodelly* v. *Soobraya Gramany* (1) and *Govind Appah* v. *Kondappah Sastrulu* (2).

The result of these decisions, we think, is that where payment of a debt is not being withheld for fraudulent or vexatious motives, but from a reasonable doubt as to the party entitled, the plaintiff is bound to produce a certificate under Act XXVII of 1860 before he can obtain a decree or execute a decree already obtained by the deceased, though he may institute his suit or apply for execution without such a certificate provided it is filed before decree or before execution issues.

In the present case, then, the order of the lower Court would appear to be technically wrong; but we should not be prepared to set the decree aside, or dismiss the suit on this ground alone.

[The decree of the Subordinate Judge was eventually set aside on the merits of the case, and on this ground, and the case remanded for further enquiry.]

J. V. W. *Case remanded.*

Before Mr. Justice Norris and Mr. Justice Beverley.

1886 *April* 15.

DOMA SAHU (PLAINTIFF) *v.* NATHAI KHAN AND OTHERS (DEFENDANTS.)*

Mortgage—Foreclosure—Notice of foreclosure—Reg. XVII of 1806.

A notice of foreclosure signed by the Sherishtadar of the Judge's Court and bearing the seal of the Court, but not the signature of the Judge, *held*, following the principle of the decision in *Basdeo Singh* v. *Muta Din* (1), not to be a valid notice under Reg. XVII of 1806, s. 8.

THE material facts of this case were as follows:—

Certain properties, which were set out in the first paragraph of the plaint, were mortgaged by the father of the defendant No. 1 to the plaintiff, to secure a sum of Rs. 7,635 under a deed of conditional sale, dated the 17th December 1875, corresponding with the 3rd of Pous 1282. In the deed of conditional sale the term for repayment of the amount was fixed at two years.

* Appeal from Original Decree No. 22 of 1885, against the decree of Baboo Girish Chandra Chaterji, Rai Bahadur, Subordinate Judge of Mozufferpore, dated the 27th of December 1884.

(1) 6 Mad. Jur., 262.

(2) 6 Mad. H. C., 131.

After the deed had been executed, the right of the original mortgagor in certain of the properties devolved upon the defendants in this suit, amongst others, the defendants Nos. 4 and 5. The plaintiff being desirous of foreclosing the mortgage and rendering the sale absolute and conclusive after the expiration of the period prescribed by s. 8 of Regulation XVII of 1806, followed, or rather purported to follow, the provisions of that section, and applied by a written petition to the Judge. The Judge, on receiving the petition, forwarded a copy of it together with a notice, to the defendants Nos. 4 and 5.

The notice bore the seal of the Court, and was signed by the sheristadar of the Court, but did not bear the signature of the Judge.

Subsequently a suit was brought for possession upon the foreclosure. When the suit came to be tried, the defendants Nos. 4 and 5 objected that the notice upon the defendant No. 5 Harihar Pershad had not been properly served, and also that, as a matter of law, no notice had been served upon him. These objections were based on the grounds that Harihar Pershad was not correctly described in the petition ; and that the notice was invalid as not having been signed by the Judge.

The Subordinate Judge upheld both the objections, and found that there was no valid service of notice on Harihar Pershad. From this decision the plaintiff appealed.

Baboo *Mohesh Chunder Chowdhuri* and Baboo *Umakali Mookherji* for the appellant.

Baboo *Kali Kissen Sen* and Baboo *Kullod Kinkur Rai* for the respondents.

The judgment of the Court (NORRIS and BEVERLEY, JJ.), after stating the facts and disposing of the objection as to the misdescription in the petition by saying that the defendants could not possibly have been misled by it, proceeded as follows :—

Another objection was raised before the Subordinate Judge, which is this : Section 8, Regulation XVII of 1806, says that the perwana which the Judge is to send with a copy of the petition shall be "under his seal and official signature." The Subordinate Judge has found, and his finding of fact is not questioned,

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that the notice, a copy of which was served upon the defendant Harihar Pershad, does not bear the official signature of the District Judge. It bears the seal of the Judge and the signature of the sheristadar of his Court. And upon the authority of a case of *Basdeo Singh* v. *Mata Din* (1) the Subordinate Judge has held that that is not a valid notice. We are of opinion that this view of the Subordinate Judge is right. We quite agree that the Allahabad decision does not go to the full extent to which the Subordinate Judge goes; and that the two cases differ in this respect—that in the Allahabad case there was only the official seal of the Court and no signature of the Judge or of any other officer, but in the present case there is the signature of the sheristadar. It would be almost impossible to hold, we think, that the sheristadar's signature is the official signature of the Judge. If there were any evidence from which we could have found as a fact that the Judge authorized the sheristadar to affix the official seal of the Court upon this perwana and authorized the sheristadar to sign his, the Judge's, name by signing his, sheristadar's, own name, the Subordinate Judge might have been in error. But there is absolutely no evidence upon the record, and one can hardly imagine any circumstances which would warrant the drawing of such an inference. We think, therefore, that this objection must hold good.

We have been asked by Baboo Mohesh Chunder that, if we find either or both of these objections to be good, to follow the decision, to which he has called our attention, of Mr. Justice Mitter and Mr. Justic Field in *Pergash Koer* v. *Mohabir Pershad Narain Singh* (2). We do not think that, under the circumstances of the case, we should be justified in doing this, because we are not satisfied that all parties, who are interested in the mortgaged properties, are before the Court. In that case apparently all the proper parties interested in the mortgaged properties were before the Court. In this case we are not satisfied that such is the case; and it might give rise to great injustice and certainly to considerable confusion, if we were to follow the course which

(1) I. L. R., 4 All., 276.
(2) I. L. R., 11 Calc., 582.

we are asked to follow. We cannot therefore accede to that application.

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The result is that the appeal must be dismissed with costs.

Appeal dismissed.

J. V. W.

APPELLATE CRIMINAL.

Before Mr. Justice Wilson and Mr. Justice Porter.

KALACHAND SIRCAR AND OTHERS *v.* QUEEN EMPRESS.*

1886 *April* 16.

Evidence Act (I of 1872), *s.* 154—*Hostile witness.*

The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from contradictions going to the whole texture of the story is not that the witness is hostile to this side or to that, but that the witness is one who ought not to be believed unless supported by other satisfactory evidence.

IN this case there were four persons committed to the Sessions Court and charged as follows :—

Kalachand Sircar and Moser Sheikh with the murder of one Sital Chunder De, and with having wrongfully confined the said Sital Chunder De and four other persons, namely, Ketu, Adu, Lalu and Meher, and with causing hurt to them with the object of compelling them to confess to the commission of theft and of compelling them to restore the property stolen.

Prannath Shaha with abetting all the above offences.

And Prosunno Coomar Shome, head constable, with abetment of hurt only.

The facts as stated by the prosecution were: That on the 18th October 1885 the house of one Shibnath Sircar was broken into and property stolen therefrom; that on the night of the 19th October Ketu, Adu, Lalu and Meher were brought to the house of Prannath Shaha and were there tortured and beaten with the object of extorting a confession from them regarding the persons implicated in the theft from Shibnath Sircar; that at a later

* Criminal Appeal No. 173 of 1886, against the order passed by W. H. Page, Esq., Sessions Judge of Furridpore, dated the 4th of January 1886.

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period that night Kalachand Sircar and Moser Sheikh were sent to bring Sital Chunder De to the same place, representing to him that he was sent for by Prosunno Coomar Shome the head constable; that on his appearance he was beaten so severely that he died of the injuries received then and there; that the body of Sital was then removed from the house and placed on the side of the road not far from the house; that a nephew of the deseased the next morning went to the Police station and informed the police that the persons who had committed the crime were, Prannath Shaha and his servants, Kalachand Sircar, Moser Sheikh, the head constable Prosunno Coomar, and a number of subordinate police officers.

The matter was then inquired into by the Magistrate. Ketu, Adu, Lalu and Meher then gave evidence to the effect that the outrage was committed by Prannath Shaha and his servants, representing the police as taking no active part in the transaction.

On this part of the case in the Sessions Court the same witnesses, Ketu, Adu, Lalu and Meher there deposed that the two servants of Prannath, Kalachand and Moser Sheikh, took part in the outrage upon Sital, but that they did so neither in the presence nor with the sanction of Prannath Shaha, but under the orders of Prosunno Coomar Shome, the head constable.

At the time when each of the four witnesses in turn gave this evidence, the Government pleader, considering the witness to be hostile, asked permission of the Court to cross-examine under s. 154 of the Evidence Act. Objection to this was taken, but overruled, and the Government pleader, on obtaining leave from the Court, elicited from each witness that he had made a different statement in the Magistrate's Court; and in turn each witness thereupon stated that the evidence given by him before the Magistrate was the real truth of the story.

It was in the course of the trial in the Sessions Court proved that Ketu, Adu, Lalu and Meher were men of the worst character, two of them being at the time under police surveillance.

The Sessions Judge and the Assessors, considering that the story told by these witnesses before the Magistrate's Court was not to be believed, rejected the story given by them in the Sessions

Court, save so much thereof as was elicited in the cross-examination held under s. 154 of the Evidence Act, and was confirmatory of the evidence given in the Magistrate's Court.

The prisoners Kalachand and Moser were thereupon found guilty of culpable homicide not amounting to murder, and were sentenced to rigorous imprisonment for seven years; and Prannath Shaha, who was found guilty of abetment of the same offence, was sentenced to ten years' rigorous imprisonment; Prosonno Coomar Shome being acquitted.

The prisoners Kalachand, Moser and Prannath appealed.

Mr. *M. P. Gasper* (with him Baboo *Jasoda Nundun Pramanick*) for the appellants.—The treatment of the four witnesses of the Crown as hostile was not justifiable; there was no hostility, they merely made two contradictory statements. The effect of their evidence, I submit, is that they have proved themselves to be utterly unworthy of belief; all the evidence in chief brought out under s. 154 ought to be struck out, and there being no other evidence directly in point the prisoners must be acquitted. The evidence given by the witnesses before the Magistrate is not sufficient to convict unless it is corroborated by independent testimony. *See Queen* v. *Amanullah* (1). As to the result of such cross-examination *see Faulkner* v. *Brine* (2); *Wright* v. *Beckett* (3); *Reg* v. *Ball* (4).

[WILSON, J.—The English law at the time the last case was decided was entirely different to the law out here.] I refer to that case for the conclusion that you were formerly not allowed to do away with the effect of such evidence.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The Court (WILSON and PORTER, JJ.) were of opinion that the convictions could not safely be sustained, and acquitted the prisoners; but as regards that part of the case touching upon the cross-examination of the four witnesses for the prosecution under s. 154 of the Evidence Act, the following passage in their judgment is extracted:—

(1) 21 W. R., 49.
(2) 1 F. & F., 254.
(3) 1 M. & R., 423.
(4) 8 C. & P., 745.

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The Sessions Judge, in concurrence with the assessors who sat with him, has selected the story told by the four witnesses for the prosecution before the Magistrate, and has rejected the one that was told before him. He arrived at this result partly in this way:—When the witnesses, one after another, told the story sworn to in his own Court, he allowed the advocate for the prosecution to cross-examine these, his own witnesses, apparently on the ground that they were hostile (of which we can see no trace), and so brought out by reference to their depositions given before the Magistrate the story which had been given in the Magistrate's Court.

It appears to us that there was no sufficient ground for allowing such cross-examination. We can see nothing on the face of their evidence to lead to the supposition that they were hostile witnesses, that is, witnesses who were trying to defeat the prosecution by suppressing the truth. The mere fact that at a sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile. The proper inference to be drawn from the contradictions in their evidence—contradictions so far as Prannath is concerned, not in the details, but in the whole texture, of the story—is not that they are witnesses hostile to this side or to that, but that they are witnesses who ought not to be believed, unless supported by other satisfactory evidence, which they are not. That in itself is sufficient to show that the conviction of Prannath cannot be supported.

But it is a somewhat different question whether the conviction of Kalachand and Moser Sheikh can be supported. As to them, these four witnesses, Adu, Meher, Ketu and Lalu, have not contradicted each other in any specific and precise way; but there is a substantial contradiction between the story now told against Kalachand and Moser Sheikh, and the story as told in the first information given at 4 o'clock on the day after the occurrence. In the first information it was represented that the outrage was committed by Prannath and his servants, and Prosunno Coomar the jemadar, and the whole body of the police. That is quite inconsistent with the story believed in the Court below, that Kalachand and Moser Sheikh

and others committed this crime with the sanction of Prannath, and in his presence, or with the other story that they did so under the orders of Prosunno Coomar, the police jemadar alone.

When these witnesses have told such fundamentally different stories about the whole transaction, and when they are proved to be disreputable men, and the story told by them is on the face of it so full of unexplained improbabilities, we do not think it safe to act upon their unsupported testimony as to the *parts* these two men, Kalachand and Moser Sheikh, are said to have taken in the alleged outrage.

We, therefore, set aside the convictions and acquit all three prisoners, Prannath Shaha Chowdhuri, Kalachand Sircar and Moser Sheikh, and direct their release.

Conviction set aside.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

LALLA CHEDI LAL AND OTHERS (PLAINTIFFS) *v.* RAMDHUNI GOPE AND OTHERS (DEFENDANTS.)*

1886 *February* 11.

Bengal Act VIII of 1869, *s.* 38—*Measurement of waste lands—Bengal Civil Court's Act* (*VI of* 1871), *s.* 22—*Appeal.*

An application for the measurement of a whole estate under s. 38 of Bengal Act VIII of 1869 cannot be granted where waste lands in that estate have been brought into cultivation by various ryots, and the landlord is unable to ascertain which of the ryots have appropriated such waste lands as part of their jotes.

Before a measurement can be ordered under that section, it is necessary to establish by evidence the facts set out in the petition for measurement; and to show that the lands sought to be measured are known, but that the tenants liable to pay rent in respect of such lands are unknown.

IN January 1882 Lalla Chedi Lal and others, the proprietors of mouzah Ahiari, applied to the Subordinate Judge of Mozufferpore,

* Special Appeal No. 1488 of 1884, from the decision of A. C. Brett, Esq., District Judge of Tirhoot, dated 19th May 1884, reversing the decision of J. C. Price, Esq., Collector of Dhurbhanga, dated 31st August 1883, and the Robocari of Baboo Ram Pershad Rai, the Sub-Judge, dated 22nd March 1884.

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under s. 38 of Bengal Act VIII of 1869, to have it declared that they were entitled to have the lands of their mouzah measured. The petition, amongst other matters, stated that the area of the mouzah was approximately 3,500 bighas, and the annual income therefrom Rs. 7,000, that the mouzah had not been measured for many years, and that it contained large tracts of waste land which had since been gradually cultivated by the tenants; but that unless measurement were taken it was impossible to ascertain the quantity of lands taken by each respective tenant. On the 5th January 1882 the Subordinate Judge, without taking any evidence on the petition, transmitted the papers to the Collector (under s. 38 of Bengal Act VIII), who, on the 11th February 1882, deputed an Ameen to take measurement of the mouzah. On the 10th October 1882 the Ameen completed his report. In December 1882 some of the ryots preferred a joint petition to the Collector impugning the accuracy of the Ameen's measurements. On the 21st March 1883 the Ameen forwarded his report to the Collector, the delay being accounted for by time taken up in fair copying the proceedings and in obtaining the signature of the ryots to the necessary papers. On the 22nd March 1883 the report was duly filed in Court.

On the 5th April 1883 one hundred and twenty-eight of the tenants jointly objected that the proprietors had no right to obtain measurement under s. 38, at the time stating that as soon as they had seen the report they would file their objections in a supplemental petition. On the 18th August these objections were filed, and after argument, were decided against the ryots on the 31st August 1883, on the ground that a joint petition of objection was not such as was contemplated by s. 38 of Bengal Act VIII of 1869, and that the petition of objection was out of time, the time running from the date on which the Ameen presented his papers. On the 4th January 1884 the Ameen's report was confirmed, and the papers sent back to the Subordinate Judge who, on the 22nd March 1884, directed that the report and papers should be put up with the record.

The tenants appealed separately to the District Judge, on the grounds that the order of the Sub-Judge, dated 22nd March 1884, filing the report, was bad, inasmuch as the Collector had no

power to proceed with the case on the order of the Subordinate Judge, dated 5th January 1882, directing measurement and making over the case to him, the Subordinate Judge having neglected to take any evidence on the petition of the proprietors, and that the petition of objection was within time. The respondents objected that, inasmuch as all the tenants impugned the Subordinate Judge's order, and the value of the land sought to be measured was over Rs. 5,000, the appeal would only lie to the High Court, and that the order of the Subordinate Judge could not be interfered with, the appeal being from the Collector's decision.

The District Judge decided that the appeal would lie to his Court, inasmuch as *the subject-matter in dispute* was not the lands of mouzah Ahiari, but the right to measure those lands, it being by no one alleged that the value put upon such measurement was over Rs. 5,000; that the Collector's decision was the final decree and the Subordinate Judge's order an interlocutory order, which could be impeached in the appeal from the decree of the Collector; and that being so he held that the order of the Subordinate Judge was bad, no evidence having been taken on the petition of the proprietors—*Mohammed Bahadoor Mozoomdar* v. *Raja Rajkissen Singh* (1); that the Collector's decision as to the objections being made out of time was wrong, the date from which the 15 days allowed by the Act should run being from the date when the Collector formally accepted the Ameen's proceedings, and not from the date on which the Ameen returned the papers to the Court.

The proprietors appealed to the High Court on the grounds: (1), that the Subordinate Judge had no jurisdiction to entertain the appeal; (2), that the Subordinate Judge was wrong in holding that he had jurisdiction to set aside the order of the 22nd March 1884; (3), that the objections were filed out of time; (4), that the measurement having been completed without any objection as to the right of the proprietors to measure having been taken, the lower Court was wrong in holding that it had jurisdiction to go into that point.

Mr. *C. Gregory*, (with him Baboo *Taruck Nath Palit* and Baboo *Abinash Chunder Bonnerjee*,) for the appellants, cited

(1) 10 B. L. R., 401.

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In the matter of Dooli Chand (1) and *Omed Ali* v. *Nityanund Roy* (2), on the question of jurisdiction, and *Goluck Kishore Acharjee* v. *Kesha Majhee* (3), to show that where ryots take no objection during the progress of the measurement the Court on appeal should not set aside the proceedings on objections made subsequently.

Mr. *Woodroffe*, Baboo *Hem Chunder Bannerjee* and Baboo *Anand Gopal Palit*, for the respondents, were not called upon.

The judgment of the Court (MITTER and NORRIS, JJ.) was as follows:—

We agree with the District Judge that the appeal in this case lay to him and not to this Court, but we would guard ourselves from being understood to say that we concur in all his reasons. It appears to us that the decision of this question depends upon s. 22 of Act VI of 1871, which says: "Appeals from the decrees and orders of Subordinate Judges and Munsiffs shall, when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds five thousand rupees, in which case the appeal shall lie to the High Court."

It is quite clear that the value of the subject-matter in dispute is the capitalized value of the excess rents, which, after the measurement applied for had been effected, the appellant before us expected that he would recover. Of this value there is no evidence on the record. That being so under the first part of s. 22 the appeal lay to the District Judge.

Upon the merits we also agree with the District Judge that the order of the Court of first instance is erroneous: The appellant before us stated in his petition: "Sixteen annas of mouzah Ahiari (main and hamlet), pergunnah Bherwara and the tolas are the right of your petitioners and their proceeds are Rs. 7,000 and approximate area 3,500 bighas."

"It is a long time ago that the said mouzah with the tolas are not measured, and in the said mouzah and tolas thousands of bighas of land were waste and pasturage for cattle, and those lands have come under cultivation, and most of the tenants,

(1) 9 B. L. R. 100; 18 W. R., 262 (268).

(2) 24 W. R., 171.

(3) 15 W. R., 23.

besides their jotes, have gradually brought those waste lands in their possession along with their former jotes; but your petitioners do not know which tenants have cultivated how much land and what kind of land is in the jote of each tenant."

That is the ground upon which this application was made for measurement under s. 38, and the ground may be put shortly thus: The waste lands of the estate having been brought under cultivation by various ryots, and the landlord not having been able to ascertain which of the ryots have appropriated these lands as part of his jote, an application was made under s. 38 for the measurement of the whole estate. We think that such an application as this does not come under s. 38 of the old Rent Act, which runs as follows:—

"If the proprietor of an estate or tenure, or other person entitled to receive the rents of an estate or tenure, is unable to measure the lands comprised in such estate or tenure, or any part thereof, by reason that he cannot ascertain who are the persons liable to pay rent in respect of the lands, or any part of the lands comprised therein, such proprietor or other person may apply to the Court which would have had jurisdiction in case a suit had been brought for the recovery of such lands, and such Court thereupon, and on the necessary costs being deposited therein by the applicant, shall order such lands to be measured." . . . . . It is quite clear that two conditions are necessary, *viz.*, that the lands are known, but the tenants are unknown. But according to the averments in the petition the tenants are known, but the lands are unknown. Section 38, therefore, cannot apply. We also agree with the District Judge that even supposing that s. 38 does apply, still before any proceeding could be initiated under that section, it was necessary for the petitioner to establish by evidence those conditions upon the establishment of which the Court could proceed to order the measurement under s. 38 of the old Rent Act. We dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

APPEAL FROM ORIGINAL CIVIL.

1886
February 26.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

GOPAL CHANDRA LAHIRI (PLAINTIFF) *v.* SOLOMON (DEFENDANT).*

Review—Mistake of Counsel—Civil Procedure Code (Act XIV of 1882), *s.* 623—*Limitation Act (XV of* 1877), *s.* 5—"*Sufficient Cause.*"

Per GARTH, C.J.—Although it is difficult and perhaps undesirable to attempt to define precisely the meaning of the words "any other sufficient reason" in s. 623 of the Civil Procedure Code, yet from the earlier part of the clause it is clear that a point which might have been, but which was not, discovered at the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review.

Per WILSON, J.—*Semble.*—If at a trial all parties, counsel on both sides, and the Judge, are under a misapprehension as to the contents of a document, or, even if the Judge alone is misled on such a point, and in consequence a wrong decree is made, the mistake ought to be corrected on review.

Per Curiam.—*Held* on the facts, that there was no "sufficient cause" for not making the application within the time limited by s. 5 of the Limitation Act, 1877.

THIS was an appeal from a decision of Mr. Justice Norris granting an application for a review.

The facts of the case are fully set out in the report of the case before the lower Court to be found on page 767 of I. L. R., 11 Calc.

Mr. *Allen*, Mr. *Mitra* and Mr. *J. G. Apcar* for the appellant.

Mr. *Bonnerjee* and Mr. *Gasper*, for the respondent.

The only two points argued were: (1) Whether there was reason sufficient for granting the review; and (2), whether the appliction was in time?

The following judgments were delivered by the Court (GARTH, C.J., and WILSON, J.):—

GARTH, C.J.—This is an appeal against an order of Mr. Justice Norris granting an application for review. The facts are somewhat peculiar.

The suit was brought by the plaintiff against the defendant Bibi Solomon, to recover a portion of certain property which the plaintiff claimed as having been conveyed to him by one Khajah

* Original Civil Appeal No. 28 of 1885, against the decree of Mr. Justice Norris, dated the 16th of July 1885.

Abdul Azeez, the brother of the defendant, under a conveyance dated the 19th of March 1883.

Mr. Phillips, who appeared for the plaintiff at the trial, opened the plaintiff's case, and claimed the property in question as having been conveyed to his client by that deed. The deed itself was produced and proved in the usual way, and as the counsel for the defendant raised no objection to the conveyance, it was taken as read.

The written statement raised the question as to the *bona fides* of the deed, as also whether Bibi Solomon's estate passed by it; but the only defence apparently which was put forward by the defendant's counsel, was that the deed was fraudulent and void as against Bibi Solomon, and that the plaintiff was merely a trustee of the property conveyed.

This defence, however, the learned Judge considered that the defendant was not entitled to raise in such a suit; and consequently the plaintiff obtained judgment. This was on the 5th of February 1885.

On the 26th of the same month the defendant Bibi Solomon brought a fresh suit against the plaintiff, praying, amongst other things, that it might be declared that the transaction evidenced by the said indenture of the 19th of March 1883 was invalid and inoperative, or that at all events it was fraudulent and void against her, Bibi Solomon. In fact that suit was founded on the same grounds as the defendant's counsel desired to set up as a defence to this suit.

On the 2nd of March notice was served on behalf of Bibi Solomon upon the plaintiff in this suit of an application that the decree in the first suit should not be executed until the suit brought by Bibi Solomon had been disposed of; and that application was heard by Mr. Justice Wilson on the 30th and 31st of March.

Mr. Bonnerjee and Mr. Gasper appeared in support of it, and Mr. Hill and Mr. O'Kinealy against it.

In the course of that hearing, Mr. Bonnerjee called for the conveyance of the 19th of March 1883, and on reading it discovered that, according to his construction of the deed, Bibi Solomon's interest in the said property, (being a $\frac{7}{24}$th share) did not pass by the instrument.

On the 9th of April following, Mr. Hill made an application to

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Mr. Justice Norris, who tried the suit, for a rule to show cause why there should not be a review of judgment.

A rule *nisi* was granted; and on its coming on to be argued before Mr. Justice Norris, it turned out that, although the defendant had not been allowed before the trial to inspect the original deed of the 19th of March 1883, upon the ground that it was the plaintiff's title deed, the defendant's attorney had been supplied with a copy of it for the purpose of preparing the written statement, and also that each of the counsel for the defendant, Mr. Bonnerjee and Mr. Gasper, had copies of the deed supplied them at the trial.

Two objections were raised on the argument of the rule: 1*st*, whether there was sufficient reason for granting the review; and, 2*ndly*, whether there was sufficient cause for not applying for the review within the 20 days allowed by the Limitation Act.

Both these points, after some hesitation, the learned Judge decided in favor of the applicant; and the rule was made absolute for a review.

This is an appeal against that decision; and the questions submitted to us in appeal were those which were raised in the lower Court, namely, 1*st*, whether there was sufficient reason for granting the review; and, 2*ndly*, whether the application was in time.

Now, as to the first of these points, the material facts, as I understand them, are these—

The claim to the property in suit as conveyed by the deed in question was *bonâ fide* made by the plaintiff at the trial. It is not suggested that there was any want of good faith in the way in which the plaintiff's case was presented or conducted, or that there was any attempt to put a construction upon the deed, which the plaintiff's advisers did not believe to be correct.

The deed itself in the operative part of it professed to convey to the plaintiff the whole of the house and premises which were the subject of the suit; and it was only by a careful examination of the recitals that the point raised by Mr. Bonnerjee in his application for review was discovered.

The defendant's advisers, her attorney and counsel, had ample opportunity for examining the deed, and of ascertaining its true construction before the trial. They had a copy of it furnished

to them for preparing the written statement, and each of the counsel at the trial had also a copy in his brief. If, therefore, they failed at the trial to see the point now raised, it was entirely their own fault.

Mr. Bonnerjee very properly and candidly admits that he did not read the deed. His attorney did not call his attention to the point now raised, and he had no reason to suppose that there was anything in the document which required examination. But whether the omission was his or the attorney's, it is obvious that the point was one which, by the exercise of due diligence, would have been discovered.

To allow a review under such circumstances would, I think, be acting in opposition, both to the letter and the spirit of s. 623 of the Code. It may be difficult no doubt, and perhaps undesirable, to attempt to define precisely the meaning of the words "*any other sufficient reason*" in that section; but it is clear from the earlier part of the clause that a point which might have been, but which was not, discovered at the trial *by the exercise of due diligence*, was not intended by the section to afford any sufficient reason for review.

But secondly the question as to limitation appears to me to present at least as much difficulty as the other.

The judgment was given on the 5th of February 1885; the decree was signed on 25th day of February 1885; but the application for review was not made until the 9th of April, long after the 20 days prescribed by the Limitation Act had expired.

Mr. Bonnerjee contends that there was sufficient cause, within the meaning of s. 5 of the Act, for not making the application within the 20 days. But what is the alleged cause? Merely that the learned counsel did not happen to read the deed until the 30th of March, when he did so for the purpose of a proceeding in another suit. If this were to be deemed a sufficient excuse for the application not being made in due time, it would be an equally good excuse for delaying the application for a year or any longer time, whenever the learned counsel might happen to read its contents.

The case of *In re The Manchester Economic Building Society*

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(1) was cited to us as an authority in favor of extending the time; but that case is no authority in favor of the respondent.

Even assuming the rules upon this subject in England to be the same as they are here, it will be found that in the case of the *Manchester Economic Building Society*, the fact which was made the ground for allowing the appeal after time, was one which the applicant was not, and could not, even by the exercise of due diligence, have been made aware of at the time when order was made which was sought to be appealed against.

I think that the appeal should be allowed, and the application for review dismissed with costs.

WILSON, J.—Upon the first question whether there were in this case grounds upon which a review could be granted, I express no opinion. If at a trial all parties, counsel on both sides, and the Judge are under a misapprehension as to the contents of a document, or even if the Judge alone is misled on such a point, and in consequence a wrong decree is made, I am disposed to think that the mistake ought to be corrected on review.

Upon the question whether there was sufficient cause for not applying within the time limited by law, I agree with the Chief Justice.

T. A. P. *Appeal allowed.*

Attorney for the appellant: Mr. *C. F. Pittar.*

Attorney for the respondent: Messrs. *Watkins & Co.*

INSOLVENCY.

Before Mr. Justice Norris.

1886 *March* 3.

IN RE MAHOMED MAHMUD SHAH, AN INSOLVENT.

Insolvency—Interest on scheduled debts—Official Assignee's Commission on interest.

Where an insolvent's estate is sufficient to pay off his creditors in full, leaving a balance in the hands of the Official Assignee, the Court will direct interest at 6 per cent. to be paid on such proved or admitted contract debts as expressly or impliedly carry interest as from the date of the filing of the petition in insolvency; and will allow the Official Assignee to retain his commission on such sum so paid as interest, directing any balance that may then remain in his hands, to be made over to the insolvent.

(1) L. R., 24 Ch. D., 488.

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IN RE MAHOMED SHAH.

IN this case the Official Assignee applied to the Court for an order that he might be at liberty to pay and divide amongst the creditors of the estate of the insolvent, after proof of their debts, a dividend amounting to Rs. 100 per cent. in proportion to their respective debts and claims; and that he might further be at liberty to pay interest on such of the admitted claims as bore interest at such rate as the Court might direct, from the date of the filing of the petition of insolvency to the present application; and that he might be at liberty to retain his commission on the amount of such interest, and to pay over to the insolvent such balance as might remain due after making all such payments as aforesaid.

The petitioner stated that the debts due from the estate amounted to Rs. 1,116-11-9; that there was then in his hands the sum of Rs. 12,106-12-11, belonging to the estate; that after payment of his commission and other charges there would remain in his hands the sum of Rs. 12,020-15-7, capable of being divided amongst the creditors of the estate; and that after payment of the scheduled creditors in full there would remain in his hands the sum of Rs. 10,904-3-10; he therefore asked for the order set out above.

The *Official Assignee* (Mr. *J. C. MacGregor*) appeared in person.

NORRIS, J.—In this case I think the surplus assets in the hands of the Official Assignee, after payment of the debts in full, ought to be applied in payment of interest at 6 per cent. on contract debts which expressly or impliedly carry interest; and that the Official Assignee should retain his commission of five per cent on the amount of such interest. The balance then remaining in the hands of the Official Assignee should be paid to the insolvent.

T. A. P. *Order as prayed.*

Before Mr. Justice Norris.

IN RE J. W. FOX, AN INSOLVENT.

1886
March 3.

Insolvency—Final discharge where insolvent is not personally present in Court—Affidavit explaining absence—Opposition to final discharge.

An insolvent who has obtained a rule *nisi* for his final discharge, but who is not personally present in Court on the return of the rule, is entitled, where no one appears to oppose the rule, to have the rule made absolute on his putting in a sufficient affidavit explaining his absence.

1886

IN RE J. W. FOX.

THIS was an application that an order, *nisi*, dated the 13th January 1886, directing the final discharge of the insolvent, might be made absolute, notwithstanding the fact that the insolvent was not himself present before the Court.

The insolvent had, on the 13th January 1886, obtained a rule *nisi* directing his final discharge, and fixing the further hearing of the matter for the 3rd March.

On that day no creditor appeared to oppose the rule, nor was the insolvent personally present in Court; he, however, appeared through his Attorney, who asked for the insolvent's final discharge, and placed before the Court an affidavit sworn on the 2nd March by the insolvent from which it appeared that the insolvent was the Commander of the S. S. "Indore" trading between Calcutta and Assam; that he had arrived in the port of Calcutta on the 28th February; that in the ordinary course of his employment he had been ordered to leave Calcutta on the morning of the 3rd March 1886, bound on a voyage to Assam in command of the said steamer, and would be unable, therefore, to appear before the Court in the forenoon of that day at the hearing of the matter of his petition and application to make absolute the order *nisi*, dated the 13th January 1886.

Mr. *Orr* appeared for the Insolvent.

NORRIS, J.—I have consulted Mr. Justice Pigot and Mr. Justice Trevelyan, and they both agree with me in thinking that the affidavit is sufficient in this case to enable me to make the rule absolute. The affidavit states sufficient reasons for the absence of the insolvent; and there is no opposition; if any one had appeared to oppose I should not have made the order.

Rule absolute.

Attorneys for insolvent: Messrs. *Barrow & Orr.*

T. A. P.

Before Mr. Justice Norris.

1886
May 5.

IN RE NOBODEEP CHUNDER SHAW, AN INSOLVENT.

Insolvency—Infant—Minor—Trading contract—Insolvent Act (11 & 12 *Vict.*,) *c.* 21.

A minor who has traded cannot be adjudicated an insolvent on the petition of the persons who have supplied him with funds for the purposes of his business.

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IN RE NOBODEEP CHUNDER SHAW.

THIS was a rule calling upon certain adjudicating creditors to show cause why an order, dated the 4th March 1886, adjudicating one Nobodeep Chunder Shaw, an insolvent, should not be set aside.

It appeared that on the 4th March 1886, Bhuggoban Chunder Roy and Bhoyrub Chunder Roy had obtained an order adjudicating Nobodeep Chunder an insolvent, alleging that he had for about 2½ years personally conducted and carried on the business of a dealer in jute holding himself out as an adult and trading as such, and alleging that he had contracted with them debts which remained unpaid, and was indebted to them in an aggregate sum of Rs. 17,000, for which sum two High Court decrees had been obtained.

On the 29th March 1886, Nobodeep Chunder obtained a rule calling on the adjudicating creditors to show cause why the order should not be set aside, stating in the petition on which the rule was obtained that at the time the debts mentioned by the adjudicating creditors were contracted, he was a minor, and therefore not a trader within the meaning of the Act for the Relief of Insolvent Debtors, and that on the 9th April 1884 he had himself filed his petition in insolvency, the present adjudicating creditors opposing; that the application was dismissed on the ground that he was an infant at the time of the filing of his petition; he further denied that he had ever held himself out as an adult, stating on the contrary that the adjudicating creditors knew, and had every means of knowing, that he was an infant, and that with full knowledge of his minority they had lent money to him; that the decrees obtained against him by the adjudicating creditors were null and void, they having been passed against him *ex parte* when he was an infant, no guardian of suit having been assigned to him, and the services of summons having been improperly served.

Mr. *T. A. Apcar* showed cause. The infant held himself out to us as an adult, and therefore can be adjudicated an insolvent—*see Ex parte Jones* (1), and *Ex parte Watson* (2); see s. 11 of Act IX of 1872 as to the power of a minor to contract.

Mr. *Pugh* and Mr. *Allen, contra*, were not called upon.

(1) L. R., 18 Ch. D., 109.
(2) 16 Ves., 265.

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IN RE NOBODEEP CHUNDER SHAW.

NORRIS, J.—I do not think it necessary that I should take time to consider what judgment I should give in this case, or encumber the record with an elaborate investigation of the older authorities in a case where the question is set at rest by the decision of the Appeal Court in *Ex parte Jones* (1), the principle of which was adopted in the Court of Appeal in Ireland in the case of *In re Rainys* (2). It seems to me that the provisions of the Contract Act are much stronger than the Infants Relief Act, a provision which formed the basis of the decision in *Ex parte Jones*. I therefore think this adjudication should be set aside.

Rule absolute.

Attorney for petitioner: Baboo *G. C. Chunder.*

Attorneys for adjudicating creditors, Messrs. *Sen & Co.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Pigot and Mr. Justice O'Kinealy.

ABOOL HOSSEIN (PLAINTIFF) *v.* RAGHU NATH SAHU (DEFENDANT.)*

1886. *March* 30.

Registration—Notice—Mortgagor and Mortgagee—Unregistered mortgage—Purchaser with notice of prior unregistered mortgage—Priority.

Where property has been mortgaged by a deed, the registration of which is not compulsory, a subsequent purchaser of the property, who has duly registered his purchase deed, but who has bought with notice of the unregistered mortgage, takes the property subject to that mortgage.

THIS was a suit instituted on the 7th February 1884 to recover the sum of Rs. 86-15-0, being Rs. 50 principal and Rs. 36-15-0 interest due on a mortgage bond executed by the defendant Raghu Nath Sahu, on the 12th of December 1877. The bond had not been registered. It appeared that Raghu Nath Sahu had, on the 29th of January 1884, sold the mortgaged property by a registered deed of sale to one Mahadeo, who was made a defendant on the 18th of April 1884.

* Appeal from Appellate Decree No. 1990 of 1885, against the decree of Baboo Ram Pershad, Subordinate Judge of Patna, dated the 30th of June 1885, affirming the decree of Moulvi Abdul Bari, Khan Bahadur, Munsiff of Patna, dated the 23rd of February 1885.

(1) L. R., 18 Ch. D., 109. (2) 3 Ir. L. Rep. Ch. 459.

The plaintiff adduced evidence to prove that Mahadeo had, previous to his purchase, notice of the plaintiff's mortgage, but the lower Appellate Court held that the question of notice was immaterial, as the defendant Mahadeo's registered deed was entitled, notice or no notice, to priority over the plaintiff's unregistered deed. The plaintiff appealed to the High Court.

Baboo *Saligram Singh* for the appellant.

Baboo *Karuna Sindhu Mookerjee* for the respondent.

The judgment of the Court (PIGOT and O'KINEALY, JJ.) was delivered by

PIGOT, J.—The question in this case which arose before both the lower Courts was, whether, when there is an unregistered mortgage, the registration of which is not compulsory, a purchaser of the property who has registered his deed of sale, but who has bought with notice of the unregistered mortgage, purchases subject to the mortgage: the Courts below held that such notice is immaterial, taking that view in consequence of what they understood to be the effect of the judgment of Mr. Justice Field in *Bamasandari Dassi* v. *Krishna Chundra Dhur* (1). In that case Mr. Field expressed the opinion that the effect of the decisions in the cases of *Fuzladdeen Khan* v. *Fakir Mahomed Khan* (2) and of *Narain Chunder Chuckerbutty* v. *Dataram Roy* (3), was not, in his opinion, to decide the point, the observations in those decisions being no more than *obiter dicta*; and the case of *Denonath Ghose* v. *Aluck Moni Dabi* (4) not having been decided by both members of the Court on the ground of notice.

Now, it is to be observed that Mr. Justice Field, in *Bamsundari Dassi's case* (1) says, at the bottom of page 427 * * *: "We think that in the present case the question does not really arise." The learned Judge's decision, therefore, does not amount, in our opinion, to a decision upon the effect of the judgments in the other cases; the learned Judge was careful to point out that there was no proof or reasonable presumption of notice in the case; and that,

(1) I. L. R., 10 Calc., 424.
(2) I. L. R., 5 Calc., 336.
(3) I. L. R., 8 Calc., 597.
(4) I. L. R., 7 Calc., 753.

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therefore, the question did not arise—see again at page 428. In the recent case of *Bhalu Roy* v. *Sakhu Roy* (1), the question was raised and expressly decided, that in such a case as the present, the purchaser with notice takes subject to the mortgage. We think that that principle must be taken to be the principle of this Court, having regard to the cases referred to by Field, J., and further to the case of *Nemai Charan Dhabal* v. *Kokil Bag* (2), where Mr. Justice Mitter followed the case of *Waman Ramchandra* v. *Dhondika Krishnaji* (3). According to these cases a person who purchases with notice of a contract for the sale of property, not requiring registration, and unregistered, purchases subject to the rights of the person with whom the contract has been entered into. We see no difference between the principle in the one case and that in the other; and we may add that the passage from Lord Cairn's judgment in *Agra Bank* v. *Barry* (4) cited in the Bombay case is one to which attention may well be invited. It lays down the principles applicable to a question of this sort. The decision of Lord Cairns is upon the Irish Act, one very similar in terms to the Indian Registration Act, and identical in principle with it.

We must remand this case, therefore, for we cannot find that the learned Subordinate Judge has come to a definite finding, aye or no, whether Mahadeo had notice of the mortgage. We express no opinion ourselves upon the evidence as to this question. We remand the case to the Subordinate Judge for a finding upon that question. The case will be kept on the file, and the record will be sent down with this judgment, and the Subordinate Judge will return his finding within three weeks from the receipt of this order.

P. O'K. *Case remanded.*

(1) I. L. R., 11 Calc., 667.
(2) I. L. R., 6 Calc., 534.
(3) I. L. R., 4 Bom., 126.
(4) L. R., 7 H. L., 135.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

JUDHISTIR PATRO (JUDGMENT-DEBTOR) *v.* NOBIN CHANDRA KHELA (DECREE-HOLDER).*

1886 *February* 11.

Limitation—Execution of Decree—Decree payable by Instalments—Instalment Decree—Option to execute—Waiver—Construction of Decree.

Where a decree is made payable by instalments, and contains a provision that, on failure of any one instalment, the whole is to become due, the question whether the decree-holder may waive the benefit of the provision or must execute his decree within three years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case.

On an application for execution of a decree made payable by instalments, *held* that the application was barred by limitation, on the ground that the judgment-creditor should have applied for execution within three years from the date of the first default in payment.

THIS was an application for execution of a decree which had been drawn up in accordance with a compromise come to between the plaintiff and the defendant. The decree directed payment of the amount due by instalments, namely Rs. 50 in Magh 1289 *(Vilaity)*; Rs. 100 in Phalgoon 1290; Rs. 65 in Magh 1291; and Rs. 60 in Magh 1292 (January-February 1885.) The decree declared that on failure to pay any one instalment the agreement for payment by instalments should come to an end, and the whole sum should become due and payable with interest at 12 per cent.

The decree-holder, whose application for execution was made in April 1885, stated that the judgment-debtor had paid the first instalment, but had made default in payment of the remaining instalments, and he prayed for execution for Rs. 225 with interest from the due date of the second instalment. The judgment-debtor denied that he had paid any of the instalments, and he pleaded that the application was barred by limitation.

The lower Courts found as a fact that the judgment-debtor had not paid any of the instalments, but they held the application not barred by execution on the authority of *Nilmadhub*

* Appeal from Appellate Order No. 367 of 1885, against the order of R. Towers, Esq., Judge of Midnapur, dated the 14th of August 1885, affirming the order of Baboo Purno Chunder Chowdhury, Second Munsiff of Tumluk, dated the 5th of May 1885.

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JUDHISTIR PATRO v. NOBIN CHANDRA KHELA.

Chuckerbutty v. *Ramsody Ghose* (1). The judgment-debtor appealed to the High Court.

Baboo *Horendra Nath Mookerjee*, for the appellant.

No one appeared for the respondent.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—No appearance has been made before us on behalf of the respondent in this case. We have been obliged to hear the appeal *ex parte*.

The case is one not of an uncommon character. A decree was passed providing for payment by instalments. It provided that, on failure to pay any one instalment, the debtor should become liable to have the whole decree executed at once at a particular rate of interest therein mentioned.

This was an application made for the execution of the whole decree with interest at the rate provided for in that decree.

The Courts below appear to have held that default was made in the very first instalment, which was to have been paid in Magh 1289; and they have ordered execution in respect of the subsequent instalments, which were not barred, it being admitted that the first instalment was barred.

It is contended for the judgment-debtor, who is the appellant before us, that the application for execution was barred by limitation. It is argued that there was no option to waive the right to realize the whole amount of the decree upon the first default, and that as the decree-holder had not done so, and as he did not bring this application within three years of the first default, the application was barred.

The Courts below relied upon a decision of this Court in *Nilmadhub Chuckerbutty* v. *Ramsody Ghose* (1). It was there held that, as the decree-holder had the option, on default of payment of any one instalment, to execute the whole decree, and did not exercise that option but received instalments due subsequent to the default, he must be considered to have waived his right to execute the whole decree. The Judges who decided that case decided it upon the terms of the decree before them. Having

(1) I. L. R., 9 Calc., 857.

regard to the terms of the decree in this case we think that the ruling in *Nilmadhub Chuckerbutty* v. *Ramsody Ghose* (1) relied upon by the Courts below, is not applicable. Here the decree distinctly provides that, upon failure to pay any one instalment, the agreement for payment by instalments shall be cancelled and the decree-holder shall thereupon realize the whole decree, and shall also obtain from the judgment-debtor interest at a certain specified rate. The decree-holder in the present instance does not profess to have waived his claim, for he seeks to realize the whole decree, and he also claims interest at the rate stipulated. He therefore seeks to take advantage of the provisions of the decree. He must, we think, be also bound by any disability which may arise upon a proper construction of that decree. Upon the terms of the decree we think that he had no option to waive his right to execute it for the whole amount; and, having neglected to take advantage of the privilege given in that decree, he is now too late to realize anything.

We accordingly allow this appeal, set aside the orders of the Courts below, and dismiss the application, with costs in this Court and the lower Courts.

P. O'K. *Appeal allowed.*

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

DWARKA NATH RAI AND OTHERS (PLAINTIFFS) *v.* KALI CHUNDER RAI AND OTHERS (DEFENDANTS).*

1886 *February* 12.

Co-sharers—Notice to Quit—Co-sharers, Suit by—Withdrawal of one co-sharer from the suit—Ejectment.

Where several co-sharers have served a joint notice to quit, upon which notice they jointly institute a suit for the recovery of the land, the fact that one of the plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.

* Appeal from Appellate Decree No. 749 of 1885, against the decree of Baboo Mati Lal Sarkar, Subordinate Judge of Dacca, dated the 26th of January 1885, reversing the decree of Baboo Ram Chunder Dhur, Second Munsiff of Manickgunge, dated the 22nd of December 1883.

(1) I. L. R., 9 Calc., 857

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DWARKA NATH RAI v. KALI CHUNDER RAI.

THE judgment appealed from was as follows:—

"These are two appeals Nos. 46, 50, from one and the same case. Plaintiff sued the defendants Nos. 1 to 5 to eject them from the land in dispute after giving them notice of ejectment. During the hearing of the case, one of the plaintiffs, *viz.*, Saroda Sundari, withdrew from the suit, and the first Court, therefore, dismissed the suit for ejectment on the ground that her co-sharers alone, *viz.*, the remaining plaintiffs, could not maintain the suit.

"These remaining plaintiffs make appeal No. 46, and contend among other things: (1), that Saroda Sundari after having jointly with them served notice of ejectment and brought the suit could not withdraw from it, and that at any rate defendants Nos. 1 to 5's tenancy terminated on the expiration of the notice, and her withdrawal, therefore, could not protect the defendants; and (2), that the tenant-defendants having denied in their written statement the plaintiffs' title as landlords, they should have been treated as trespassers, and a decree should have been given to the remaining plaintiffs for possession of their share in the land.

"The tenant-defendants made appeal No. 50, and they contend among other things that the first Court, finding that the remaining plaintiffs alone were not entitled to eject, should have simply dismissed the suit, and should not have recorded its findings on the other points which arose in the case.

"On the first point in appeal No. 46, the ruling in *Mohamaya Chowdhrani* v. *Durga Churn Shaha* (1) shows that as Saroda Sundari did not ask for permission to bring a fresh suit, the first Court could allow her to withdraw from the suit. The appellants in No. 46 then refer to s. 111 of the Transfer of Property Act, and contend that the defendants Nos. 1 to 5's tenancy terminated on the expiration of the notice of ejectment, and that to hold that the suit could not be maintained on account of Saroda Sundari's withdrawal, would be virtually to enable her to re-introduce tenants on ijmali land without the consent of her co-sharer. But reading s. 113 of the same Act I hold that, as the notice was expressly waived by the plaintiff Saroda Sundari, it became void *ab initio*, as respects her share, so that the

(1) 9 C. L. R., 332.

case stood after withdrawal as if there had been no notice given on her part. If the land were *bhiti*, and its tenants were given notice to quit after 11 years' occupation, and then the notice were waived, and the tenant allowed to occupy for one year more, would clause (*h*), s. 111 of the Transfer of Property Act prevent the tenant from acquiring a right of occupancy? I think under s. 113 of the Act it would not. In this view of the case, I think the first point should be decided against the appellants in No. 46, as they alone could not have sued to eject.

"On the second point in appeal No. 46, I think plaintiffs can, after the tenant-defendants have denied the relation of landlord and tenant, treat the defendants as trespassers and bring a suit for possession of their share. But I doubt if a decree for possession on that ground can be given in the present suit. Here the repudiation was after the institution of the suit. I have not been shown any authority giving a decree on a cause of action accruing after the institution of the suit. Two rulings have been cited by the appellants—*Shumsher Ali* v. *Doya Bibi* (1), and *Sutyabhama Dssee* v. *Krishna Chunder Chatterjee* (2). But it appears to me on reading the full report that in each of these cases there was a repudiation on the part of the tenant before the cases were brought, and as the tenants insisted on their repudiation of the plaintiff's title the High Court decided against them. Neither of these two cases shows that a decree was given simply because during its progress the tenants repudiated the plaintiff's title. I therefore find the second point in No. 46 also against the appellants in that case."

On the tenants' appeal the Subordinate Judge reversed the findings of the Munsiff in the authority of *Barhamdeo Narain Sing* v. *Mackenzie* (3)."

The plaintiffs appealed to the High Court.

Baboo *Durga Mohun Das*, for the appellants.

Baboo *Hari Mohun Chackrabati* and Baboo *Kuloda Kinkar Rai*, for the respondents.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

(1) 8 C. L. R., 150.

(2) I. L. R., 6 Calc., 55.

(3) I. L. R., 10 Calc., 1095.

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DWARKA NATH RAI v. KALI CHUNDER RAI.

This is a suit originally brought by five persons claiming as proprietors of the land held by the defendants, to eject them on service of notice.

In the course of the proceedings in the first Court, one of the defendants, Saroda Sundari Gupta, obtained leave to withdraw from the appeal, and was accordingly made a defendant by the other plaintiffs.

The Subordinate Judge in appeal has found that, although notice was served by all the landlords, still, inasmuch as one of them was not a plaintiff in the present suit, it must fail. The authorities cited to us—*Radha Proshad Wasti* v. *Esuf* (1), and *Reasut Hossein* v. *Chorwar Sing* (2)—do not support this view of the law. It seems rather that the plaintiffs now on the record are entitled to ask for a decree to get possession as against the defendants of their share of the estate provided that they succeed in other respects. As has been pointed out already by this Court, if such a suit were not possible, it would be in the power of the proprietor of a very small portion of a property to prevent the other proprietors from ever asking for their rights. We think, therefore, that the suit should proceed.

P. O'K. *Appeal allowed.*

Before Mr. Justice Prinsep and Mr. Justice Trevelyan.

1886 *February* 11.

MOSHAULLAH (DEFENDANT) *v.* AHMEDULLAH (PLAINTIFF.)*

Appeal—Ex parte Order—Admission of Appeal—Limitation Act, 1877, *s.* 5—*Sufficient cause.*

An *ex parte* order admitting an appeal is subject to reconsideration on the hearing of the appeal.

Poverty is not sufficient cause, within the meaning of s. 5 of the Limitation Act, Act XV of 1877, for admitting an appeal after the ordinary period of limitation prescribed therefor has expired.

THIS was a suit to recover from the defendant the sum of Rs. 7,000, and for a declaration of lien over certain properties, situated in the 24-Pergunnahs, belonging to the defendant, a list of which was annexed to the plaint. The Court of first instance

* Appeal from Original Decree No. 6 of 1885, against the decree of Baboo Nuffur Chunder Bhutto, First Subordinate Judge of 24-Pergunnahs, dated the 27th of February 1884.

(1) I. L. R., 7 Calc., 414. (2) I. L. R., 7 Calc., 470.

passed a decree in favour of the defendant on the 27th of September 1883. On the 12th of December 1883, the plaintiff applied for a review of judgment which was granted, and by a decree passed on review on the 27th of February 1884, the Subordinate Judge decreed the plaintiff's claim.

The defendant applied to the High Court for leave to appeal *in forma pauperis*, and on the 6th of January 1885, an *ex parte* order was passed directing that the appeal be registered on payment of the Court-fee stamp of Rs. 34-3, which was done. When the appeal came on to be heard, the pleader for the respondent took a preliminary objection that the appeal had not been filed in proper time.

Baboo *Rajendra Nath Bose*, Baboo *Jadub Chunder Seal* and Baboo *Gopal Chunder Ghosal*, for the appellant.

Baboo *Saroda Churn Mitter*, for the respondent.

The judgment of the Court (PRINSEP and TREVELYAN, JJ.) was as follows:—

It is sufficient for the matter now under consideration, that is to say, whether or not the appellant has satisfied us that he had sufficient cause for not presenting this appeal within the period prescribed by law, to refer only to the order passed by a Division Bench of this Court on the 6th January 1885, admitting the appeal. That order was passed *ex parte*, and without notice to the respondent; and it was therefore open to reconsideration if the respondent after notice of the appeal thought proper to question the right of the appellant to have it admitted.

The grounds assigned by the appellant for special indulgence under s. 5 of the Limitation Act were then stated to be that he had not sufficient funds to proceed in the regular manner within the time prescribed by law, and it is now objected that this is not a sufficient cause. We think that the objection is fatal. If such ground be accepted as sufficient cause for a special order of this description, there would be no limit to the period for extending the usual term of limitation to presenting an appeal. We therefore feel bound to hold that this appeal is barred by limitation and we accordingly dismiss it.

Each party must pay his own costs.

P. O'K. *Appeal dismissed.*

CIVIL REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

1886 *January 7.*

DHUMEE BEHARA (PLAINTIFF) *v.* C. H. C. SEVENOAKS (DEFENDANT.)*

Master and servant—Monthly service—Wrongful leaving of employment, Consequence of—Right to Wages.

When a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all rights to wages for the time he had actually served during that month.

DHUMEE BEHARA, who had been a punka-puller in the service of C. H. C. Sevenoaks, brought a suit against the latter for balance of wages due for the month of July and 12 days of August. The defendant pleaded payment of Rs. 2 for the month of July and non-liability for the 12 days of August, on the ground that the man had left his service without giving any previous intimation. The Munsiff, sitting as a Court of Small Causes, found that the plaintiff had been engaged on Rs. 3 a month; that he had abruptly left his employment without any reasonable cause, and received only Rs. 2 for the month of July; but, in pursuance of the rule followed by the Calcutta Court of Small Causes in such cases, namely that "when a monthly servant leaves his employment wrongfully in the course of the then current month, he loses all right to wages for the time he had actually served during that month," gave a decree for one rupee and dismissed the claim for the 12 days of August, subject to the decision of the High Court, to which he referred the following question under s. 617 of the Civil Procedure Code:—

"Whether a servant who was employed by the month, but who leaves his employment abruptly and without any previous intimation in the middle of the month, and that not on account of any fault, omission or ill-treatment on the part of the employer, is entitled to his wages proportionate to the number of days he has actually served."

The decision of the High Court (GARTH, C.J. and BEVERLEY, J.) was as follows:—

We think that the rule laid down by the Judges of the Calcutta

* Civil Reference No. 24 of 1886, made by Baboo Behari Lal Mullick, Munsiff of Midnapur, dated the 16th of September 1885.

Court of Small Causes is correct, and that the same rule is applicable to the Mofussil. An old Regulation (Regulation VII of 1819) provided that in such cases fifteen days' notice should be given by either party wishing to terminate the contract, and that in default of notice fifteen days' pay should be forfeited. But that Regulation has been repealed, and in the absence of any legislative enactment on the subject, we think that the Calcutta rule is generally and correctly followed.

K. M. C.

PRIVY COUNCIL.

SARABJIT SINGH (PLAINTIFF) *v.* F. C. CHAPMAN (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner, Oudh.]

P. C. *
1886
February 10.

Lunatic—Act XXXV of 1858, *s.* 9—*Court of Wards in Oudh—Power to lease lands of proprietor disqualified from lunacy.*

The order of a Civil Court declaring, under Act XXXV of 1858, an Oudh talukdar to be of unsound mind and incapable of managing his affairs, renders him a disqualified proprietor within the meaning of s. 9 of that Act, with the result that the Court of Wards is authorized to take charge of his estate without a further order of the Civil Court appointing the Court of Wards to be manager.

A Civil Court having made an order declaring a talukdar to be of unsound mind and incapable of managing his affairs, and having at the same time appointed to be manager of his estate the Deputy Commissioner of the District, who also acted as manager of the Court of Wards :

Held, that a lease for more than five years made by the latter officer, as representing the Court of Wards, was not invalidated under s. 14 of the above Act, providing that no manager, appointed by the Civil Court under it, shall have power to grant a lease for any period exceeding five years.

APPEAL from a decree (19th September 1883) of the Judicial Commissioner of Oudh, affirming a decree (19th September 1882) of the District Judge of Rae Bareli.

The principal question now raised related to the provision in s. 14 of Act XXXV of 1858 (an Act to make better provision for the care of the estates of lunatics), that no manager appointed by the Civil Court under that Act to take charge of the estate of a person adjudged to be of unsound mind and

* *Present:* LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, AND SIR R. COUCH.

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incapable of managing his affairs, should have power to grant a lease for any period exceeding five years.

Whether this had the effect of invalidating a lease of lands, part of a taluk, for twenty-five years, made by the Court of Wards, the Deputy Commissioner of the District having been appointed manager of the talukdar's estate by the same order which adjudged the talukdar to be a lunatic, was the point raised by this appeal.

On the 10th April 1872 Rae Jagat Bahadur Singh, talukdar of Bhadri, through whom the plaintiff claimed, was adjudged by the Deputy Commissioner of Sultanpur, under Act XXXV of 1858, to be of unsound mind and incapable of managing his affairs, and by the same order the Deputy Commissioner of Pertabgurh was appointed his guardian and manager of his estate.

On the 23rd June 1874, under the sanction of the Chief Commissioner, a lease for twenty-five years from the Court of Wards as manager of the Bhadri estate, was made of four villages belonging to it, at the annual rent of Rs. 15,565. This was registered on 6th July 1874.

On the 3rd February 1878, Rae Jagat Bahadur Singh died, and the plaintiff, as his successor, obtained possession of the Bhadri estate on the 1st October following.

The present suit was instituted on the 20th December 1881 to obtain a declaration that the lease was null and void, and for possession of the land comprised in it with mesne profits and costs. The defence, *inter alia*, was that the lease was valid having been duly sanctioned, the Chief Commissioner, as the principal revenue officer in Oudh, having plenary powers under the orders contained in paragraph 76 of the letter of the Government of India, dated 4th February 1876, which had obtained the force of law under Indian Councils Act 1861 (24 and 25 Vic. c. 67), s. 25.

The Court of first instance, the District Judge of Rae Bareli, held that the lease was originally valid, being within the powers of the Court of Wards to grant. He also held that, because the plaintiff had by the receipt of rent and other acts appeared to ratify the lease, acquiescing in the lessee's possession, the lease could not now be disputed. On the latter ground a decree

dismissing the suit was supported on appeal by the Judicial Commissioner, who was of opinion that the lease was originally invalid on account of the restriction in s. 14, although the plaintiff was not now in a position to assert its invalidity.

The plaintiff having presented this appeal,—

Mr. *J. Graham, Q.C.*, and Mr. *J. D. Mayne*, for the appellant, argued that the Judicial Commissioner had correctly held the lease to be invalid in its origin, and that both the Courts below had attributed too great an effect to such acquiescence on the part of the plaintiff as might have taken place. This had not affected the duration of the lease, the term remaining subject to the express language of s. 14 of Act XXXV of 1858.

Their Lordships intimated that it was in regard to the original validity of the lease for twenty-five years that they desired to hear argument.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, for the respondent, argued that the Deputy Commissioner, as representative of the Court of Wards, was not bound by the restriction in s. 14, although he had been appointed in the order declaring Rae Jagat to be a lunatic. He was manager of the lunatic's estate as representing the Court of Wards, without any authority as manager derived from the order of the Civil Court appointing him.

Mr. *J. Graham, Q.C.*, replied.

At the conclusion of the arguments their Lordships' judgment was delivered by

LORD BLACKBURN.—Their Lordships think that the decision of the Court below, which has been appealed against, was the right decision, but they do not agree exactly with the reasons given below.

Their Lordships have first to consider what point is raised by this case. The talukdar who owned the property in question became a lunatic, and an application was duly made for an inquiry into the state of his health under the 3rd section of Act XXXV of 1858. That application was made by the officer of the district where this taluk was situated; and the Civil Court to which the application was made, having caused notice to be given, did

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enter into an inquiry, and the result was that the talukdar was adjudged to be a lunatic. Thereupon the 9th section of Act XXXV of 1858 applied, which provides that: "when a person has been adjudged to be of unsound mind and incapable of managing his affairs, if the estate of such person or any part thereof consist of property which by the law in force in any Presidency subjects the proprietor, if disqualified, to the superintendence of the Court of Wards, the Court of Wards shall be authorised to take charge of the same." At the time Act XXXV of 1858 was passed, Oudh was not part of the British dominions (1), but it has become so since, and their Lordships take it that the Court of Wards may be considered as having the same jurisdiction, and all the powers that the Court of Wards elsewhere would have had. Therefore, under s. 9, the Court of Wards was authorised "to take charge of the same." It seems to have been rather hastily concluded by the Judge below that the Court of Wards being authorised by the Legislature "to take charge of the same," required some further order from the Civil Court which adjudged the talukdar to be a lunatic to justify them in acting. Their Lordships think there is no ground for saying that, though s. 9 goes on to provide: "In all other cases, except as otherwise hereinafter provided, the Civil Court shall appoint a manager of the estate."

It appears that the Civil Court, when they declared the talukdar to be a lunatic and so authorised the Court of Wards in Oudh to manage his property, did contemporaneously make an order appointing as the manager of the property the same person who acts as the manager under the Court of Wards. In the 14th section of the Act there is a provision that "every manager of the estate of a lunatic appointed as aforesaid," that is a manager appointed, not the Court of Wards, "may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a lunatic, and may collect and pay all just claims, debts, and liabilities due to or by the estate of the lunatic; but no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of

(1) This seems to be a mistake. Act XXXV of 1858 was passed on the 14th September 1858, and the annexation of Oude had then taken place.—*Ed.*

any immoveable property for any period exceeding five years." Their Lordships suppose that the object of this order probably was that the Court thought *ex majore cautela* "if there is any ambiguity about it we will take care that the Court of Wards has double power, and the manager shall act both under this Court and the Court of Wards." It may not have been judicious, but that is the utmost object the Court could have had, and if it was wrong it will not be a bit the worse.

Such being the case, the Court of Wards did enter into possession of the estate and the management of it. The lunatic continued to live till 1874, when a lease was granted, the details of which need not be further stated than to say that it was a lease for 25 years with various terms and provisions in it. It professes to be a lease of certain villages belonging to the Bhadri estate under the Court of Wards which was granted to Captain F. C. Chapman, with the sanction of the Chief Commissioner of Oudh, conveyed in a letter of the 2nd April 1874 to the Subordinate Commissioner. Their Lordships pause to ask what objection is there to this lease? No attempt is made to show that it was a lease improper in its terms, or that there was anything that amounted to an imposition, or that it was obtained by fraud or obtained improperly; but the one point relied upon against the lease is that it could not be granted for more than five years, and that objection, whatever might be its importance if the lease had been granted by one acting only under the authority of an appointment as manager by the Civil Court, does not seem to apply to a lease granted by the Court of Wards. That is the objection on which it is sought to set the lease aside.

The Judge of first instance entered into a great many questions which their Lordships do not pretend to follow; but there are a great many allegations to show that, even if the lease was originally void if granted for more than five years, it had been made good by subsequent acts after the lunatic was dead, and the present appellant (the plaintiff in the suit) had come into enjoyment of the estate. Their Lordships do not propose to enter into those questions at all, because they do not arise unless it can be shown that the objection that the lease exceeded a term of five years applies, and it certainly seems to their Lordships that

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it does not. The Judicial Commissioner on appeal arrived at the same result, that the lease was good, by a different process of reasoning, for he held that there were various things, by estoppel and otherwise, which prevented the plaintiff from setting aside an invalid lease. Their Lordships would require a good deal more thought and consideration than has yet been given to the case before they pronounced an opinion upon such a point as that; but if it be correct to say, as their Lordships are decidedly of opinion that it is, that the Court of Wards could grant such a lease as this, and that it was not impeachable merely because it exceeded five years in length, no other objection being made, this lease is good and nothing further arises upon it. The lease was not void and could not be set aside, and consequently it stands. If there were other objections than this they have not been raised. Their Lordships do not suppose there are any, and they therefore think that the judgment appealed from should be affirmed, although not for the same reasons by any means that were given below.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from should be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *Sanderson & Holland.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

1886 *March 4.*

HURROSUNDARI DABI (PLAINTIFF) *v.* BHOJOHARI DAS MANJI (DEFENDANT).*

Second Appeal—Appeal to the High Court—General Clauses Act (I of 1868), s. 6—Effect of Repeal—Proceedings—Bengal Rent Act (VIII of 1885), s. 5.

The words "any proceedings commenced before the repealing Act shall have come into operation" in s. 6 of the General Clauses Act (I of 1868).

*Appeal from Appellate Decree No. 2292 of 1885, against the decree of S. H. C. Tayler, Esq., Judge of Burdwan, dated the 28th of July 1885, affirming the decree of Baboo Nilmoni Das, Munsiff of Raneegunge, dated the 28th of January 1885.

include an appeal against a decree made before the passing of the repealing Act, as such appeal must be considered a proceeding in the original suit.

In a suit between landlord and tenant a decree was passed by the lower Appellate Court on the 28th of July 1885. Under the provisions of the Act then in force, namely, Beng. Act VIII of 1869, s. 102, a second appeal to the High Court was prohibited. That Act was repealed by Act VIII of 1885, which came into force on the 1st of November 1885, this latter Act allowing an appeal to the High Court in suits similar to the one in question. A second appeal to the High Court in that suit was filed on the 18th of November 1885.

Held, that no appeal lay.

THIS was a suit for arrears of rent at an enhanced rate. The sum claimed was Rs. 24-7-6, being the rent of the year 1290 (1883-84). The plaint stated that the defendant was one of the plaintiff's ryots; that the plaintiff had remeasured the defendant's holding and found that he held more land than he was entitled to; that thereupon the defendant's rent was increased in proportion, the rate per beegah being settled by the defendant who caused his agent to sign on his behalf the jamabandi which was prepared on the occasion. The defendant, by his written statement, denied that he had agreed to pay the increased rent, and also denied that he had authorised any one to sign the jamabandi on his behalf. Both the lower Courts found in favour of the defendant, and gave a decree for the amount admitted by him.

The plaintiff appealed to the High Court, on the ground that the Courts below should have found what excess lands were held by the defendant, and should have given a decree for the rent of the excess which might, on investigation, be found in the plaintiff's possession. The suit was instituted on the 30th July 1884. The decree of the Court of first instance bore date the 20th January 1885, and that of the lower Appellate Court was dated the 28th July 1885. The grounds of appeal to the High Court were filed on the 18th of November 1885, on the opening of the Court after the Dusserah vacation. At the hearing of the appeal the pleader for the respondent objected that the case was governed by the provisions of Beng. Act VIII of 1869, and not by those of the new Rent Act, VIII of 1885, which came into force on the 1st of November, 1885, and that therefore no appeal lay to the High Court.

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HURRO-SUNDARI DABI v. BHOJOHARI DAS MANJI.

Baboo *Jagat Chunder Banerji*, for the appellant.

Baboo *Taruck Nath Sen*, for the respondent.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was delivered by

WILSON, J.—The question raised in this case is, whether an appeal lies.

The decree appealed against was a rent decree of such a character that under s. 102 of the old Beng. Rent Act (VIII of 1869) no second appeal would lie to this Court. After the date of that decree the new Rent Act (VIII of 1885) was passed, and that Act repealed s. 102 of Act VIII of 1869, and substituted other provisions on the subject. And we may take it, for the purpose of the present point, that those provisions are such that the present appeal would not be excluded by them. The question whether this appeal lies or not depends on the construction of s. 6 of the General Clauses Act (I of 1868). That section says: "The repeal of any Statute, Act, or Regulation shall not affect anything done, or any offence committed, or any fine or penalty incurred, or *any proceedings commenced before the repealing Act shall have come into operation.*" The question is whether the words, "any proceedings *commenced before the repealing Act shall have come into operation,*" include an appeal against a decree made before the passing of the repealing Act. If they do, the repealing Act cannot give an appeal in this case. We think that there is clear authority for saying that the word "proceedings" in s. 6 of the General Clauses Act does include an appeal.

In the case of *Mungal Pershad Dichit* v. *Girja Kant Lahiri* (1) a very similar question was before their Lordships in the Privy Council with regard to the construction of the Limitation Act (IX of 1871). By s. 1 of that Act nothing contained in certain portions of the Act was to apply to suits instituted before the 1st of April 1873; and it was held by their Lordships that applications for execution in suits instituted before the passing of that Act fell within those terms. Their Lordships said: "It appears to their Lordships that a thing which applies to an application

(1) I. L. R., 8 Calc., 51.

in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained." If an application for the execution of a decree in a suit is a proceeding in the suit, it would seem to follow that an appeal is also a proceeding in the suit; and the word "proceeding" appears to be quite as wide a word as "suit." But on the point before us there are no less than three direct decisions.

In the case of *Ratan Chand Shrichand* v. *Hanmantrav Shivbakas* (1), the question was raised in this way: There was an Act in force under which an appeal was given in certain cases. That Act was repealed, and on the date on which it was repealed the decree in question then had already been passed, but no appeal had been filed, and the question was, whether on the construction of s. 6 of the General Clauses Act, the word "proceedings" in that section included an appeal, and whether therefore the appeal lay. The Court held that an appeal was a part of the "proceedings," and therefore was not affected by the repealing Act.

The same view was taken by two Judges, Sir R. Garth, C.J., and Jackson, J., in a Full Bench of this Court, in *Runjit Singh* v. *Meherban Koer* (2). And the same view was also taken by a Full Bench of the Allahabad High Court in the case of *Thakur Pershad* v. *Ashan Ali* (3).

These cases are on all fours with the present case, with this exception, that there an appeal was given under the repealed Act, and it was held that the repealing Act did not take away the appeal. Here the repealed Act excluded an appeal. It follows, on the same principle, that the repealing Act cannot give an appeal.

We hold therefore that no appeal lies in this case.

The appeal is dismissed with costs.

Appeal dismissed.

P. O'K.

(1) 6 Bom. H. C., 166. (2) I. L. R., 3 Calc., 662.
(3) I. L. R., 1 All., 668.

Before Mr. Justice Mitter and Mr. Justice Norris.

1886
March 12.

RABBABA KHANUM (PETITIONER) *v.* NOORJEHAN BEGUM, *alias* DALIM SHAHIBA AND OTHERS (OPPOSITE PARTIES).*

Parties—Interpleader suit, Application to be made a party to—Civil Procedure Code, ss. 32, 622—*Power of High Court on Revision—Power to add parties.*

A merely erroneous construction of the provisions of an Act is not a ground for relief under s 622 of the Civil Procedure Code.

M J instituted an interpleader suit against two rival claimants, *N* and *A*, in respect of a sum of Rs. 20,000. *R* subsequently claimed a portion of the money and applied to be made a party to the suit; but was opposed by *M J* and *N*. The Subordinate Judge refused the application on the ground that, though it was probably made under s. 32 of the Civil Procedure Code, *R*'s right or claim not having been admitted by the plaintiff nor asserted to his knowledge, she was not a necessary party under the special provisions of Chapter XXXIII of the Civil Procedure Code, and referred her to a regular suit.

Held, that the order, though based upon an erroneous construction of the provisions of s. 32 of the Code, did not come within the scope of s. 622, inasmuch as it could not be said that the Subordinate Judge had failed to exercise a jurisdiction vested in him by law.

Held, also, that a Court may, in the exercise of its discretion under s. 32 of the Code, add a party to a suit upon his own application.

MIRZA JURAT, on the allegation that he held a sum of Rs. 20,000 for the benefit of the widows of his father, Mirza Himmat, instituted an interpleader suit in the Court of the Subordinate Judge of Gya, in which he represented Noorjehan Begum and Mussamut Azmatunnissa as the rival claimants. Rabbaba Khanum then came in, and, alleging herself to be one of the widows of Mirza Himmat, made an application to the Court that she might be added as a party to the suit. Mirza Jurat, as well as Noorjehan Begum, having opposed the application, the Sub-Judge disallowed it, and referred the petitioner to a regular suit. Against that order Rabbaba Khanum presented a petition to the High Court (GARTH, C.J., and BEVERLEY, J.) and obtained a rule calling upon the plaintiff and Noorjehan Begum to show cause why the prayer of the petitioner to be made a party to the suit should not be granted.

* Civil Rule No. 1451 of 1885, against the order of Baboo Kali Prasanna Mukherji, Subordinate Judge of Gya, dated the 18th of November 1885.

On the rule coming up for argument,—

The Advocate-General (Mr. *Paul*) and Baboo *Saligram Singh*, for the petitioner.

Mr. *Abul Hossain* and Baboo *Surendra Nath Roy*, for the plaintiff, opposite party.

Mr. *O'Kinealy* and Munshi *Mahomed Yusoof* for the defendant, opposite party.

The Court (MITTER and NORRIS, JJ.) delivered the following judgment:—

This rule was argued before us on Tuesday last; Mr. O'Kinealy showing cause against it, and the Advocate-General supporting it.

The facts of the case, as stated in the affidavit of the petitioner, are as follows:—

One Mirza Himmat, who was possessed of considerable property in British India, was killed in Turkish Arabia on 26th August 1884; he left four widows, *viz.*, Mussamut Rabbaba, Mussamut Jhabhan, Mussamut Goharunnisa and Mussamut Azmatunnissa, together with a child or children by each. It was alleged by Mr. O'Kinealy that Mirza Himmat left a fifth widow, by whom he had four children; the Advocate-General alleged that the lady, Noorjehan Begum, had been divorced by Mirza Himmat in his lifetime. On 3rd September 1884 the children of Noorjehan Begum applied to the District Judge of Gyā for a certificate under Act XXVII of 1860, in which they admitted that their mother had been divorced from their father. On 16th September 1884 Mirza Jurat, one of Mirza Himmat's sons by Mussamut Goharunnissa, also applied for a certificate, and he alleged that his father had divorced Noorjehan Begum. On 6th November 1884, Mussamut Rabbaba, who is a Persian lady, residing in Persia, preferred a petition to the Persian Consul at Baghdad, praying that her interests as widow and heiress of Mirza Himmat might be protected. This petition was forwarded to the Government of India, and found its way to the Judge of Gya on 15th January 1885. On 27th March 1885, Mussamut Rabbaba sent a petition to the Judge of Gya, and on 4th June

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1885 sent him a telegram, to which telegram the Judge replied, advising her to send a vakalutnama to a pleader; she sent the vakalutnama, but before it reached Gya, the Judge had, on 26th May 1885, disposed of the applications for a certificate and had granted it to Mirza Jurat. The Judge appears to have recognised the rights of Mussamut Rabbaba as an heiress to her husband, for he directed Mirza Jurat to hold Government Promissory Notes for Rs. 20,000 on her account.

On 25th July 1885 Mirza Jurat put in a petition before the Judge in which he withdrew his former statement that Noorjehan Begum had been divorced by his father; and in breach of the Judge's order paid over to her Rs. 10,000 out of the Rs. 20,000 he had been directed to hold for Mussamut Rabbaba. Upon this Mussamut Azmatunnissa put in a petition alleging that Mirza Jurat, in making the payment of Rs. 10,000 to Noorjehan Begum, was acting fraudulently and in breach of the security bond he had given, whereupon the Judge ordered him to take back the Rs. 10,000 from Noorjehan Begum, which he did. On 11th September 1885 Mirza Jurat (in collusion, it was alleged by the Advocate-General, with Noorjehan Begum) instituted an interpleader suit against Noorjehan Begum and Mussamut Azmatunnissa in respect of the Rs. 20,000 in the Court of the Subordinate Judge of Gya.

On 8th October 1885, Mussamut Rabbaba put in a petition praying to be made a party to the interpleader suit. On 17th November 1885 Mussamut Azmatunnissa put in a petition admitting Mussamut Rabbaba as widow and heiress of Mirza Himmat, and offering no objection to her being made a defendant in the interpleader suit. Mirza Jurat and Noorjehan Begum opposed the application, and on 19th November 1885 the Subordinate Judge dismissed the application. His judgment was as follows: "This is an application on behalf of one Mussamut Rabbaba to be made a party to an interpleader suit pending in this Court. The application is probably made as one under s. 32 of the Civil Procedure Code; but the suit is one of peculiar character; such suits are not common, and the special provisions made for them are those contained in Chapter XXXIII of the Civil Procedure Code. Such a suit is instituted when

two or more rival claimants assert claims in respect of the same thing against a stakeholder, who in such circumstances institutes the suit to have the right of the different claimants determined. Here the applicant's right or claim is not admitted by the plaintiff, and so I do not think her to be a necessary party to this suit. If she has any right she can assert it in a regular suit. I do not think it right to make this suit complicated by introducing in it parties whose rights are in dispute and who asserted no claim to the plaintiff. I refuse to admit this petition and it is accordingly rejected." This is no doubt an unfortunate judgment, and it is difficult to understand what the Subordinate Judge really means. The Advocate-General urged that the Subordinate Judge meant to say that the provisions of s. 32 had no application to interpleader suits, and were not capable of application to such suits. If we were satisfied that such was the Judge's meaning, we think we might reasonably have held that he "had failed to exercise a jurisdiction vested in him by law," and might have interfered under s. 622 of the Civil Code Procedure. But we do not think the Judge means to hold that s. 32 is not capable of application to interpleader suits. What we think he has held, and held erroneously, is that no person should be added as a defendant to an interpleader suit unless the plaintiff recognizes some right in the party who seeks to be added to share in the thing in respect of which the interpleader suit is brought. This is not "failing to exercise a jurisdiction vested in him by law," but simply putting an erroneous construction upon the provisions of an Act. We are therefore constrained, reluctantly, to discharge the rule, but we shall do so without costs. Mr. O'Kinealy, in the course of his argument, urged that s. 32 of the Civil Procedure Code did not contemplate the addition of a party upon his or her own motion, and in support of his contention he cited *Badsha* v. *Nicol Fleming & Co.* (1), *Parshadi Lal* v. *Ramdial* (2) and *Biswas* v. *Biswas* (3). In the first case the plaintiffs had purchased a cargo of rice, by sample, from the defendants, who had purchased it, by sample, from one Pestonjee Eduljee; the defendants applied to have their vendor

(1) I. L. R., 4 Calc., 355. (2) I. L. R., 2 All., 744.
(3) I. L. R., 5 Calc., 882.

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added as a defendant, alleging that the question between the plaintiffs and themselves was the same as between themselves and their vendor. Pontifex, J., refused the application upon the ground "that he could not say that, in the suit by the defendant against Nicol Fleming & Co., the plaintiff *ought* to have joined Pestonjee Eduljee as a defendant; nor could he say that the presence of Pestonjee Eduljee was *necessary* in order to enable the Court effectually and completely to adjudicate and settle the question involved in the suit between Badsha and Nicol Fleming and Co." The question whether Pestonjee Eduljee might have been added on his motion, though he was hardly likely to make such a motion, was not considered. The case of *Biswas* v. *Biswas* was a suit for the partition of joint family property, and the mortgagees of the right, title and interest of the plaintiff applied under s. 32 of the Civil Procedure Code to be added as parties. Wilson, J., refused the application upon the ground "that he did not consider their presence necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit." No doubt the learned Judges are reported to have said "that s. 32 does not contemplate any application by the person proposed to be added." But we have the authority of the learned Judge to say that he did not mean to lay down as a matter of law that no party could be added to a suit upon his own application. In the case of the *Oriental Bank Corporation* v. *Charriol*, No 29 of 1882, Pigot, J., in an unreported judgment, delivered on 25th January 1886, deals exhaustively with this point (1). He says: "An objection was taken preliminary to the question as to the propriety of making the Banque parties; it was that s. 32 does not expressly provide that persons not parties to the suit may apply under the section, and a case of *Biswas* v. *Biswas* (2) was referred to; if that case laid down that such an application could not be entertained, I should of course follow it, but I do not understand that this is so, and I find that in *Vavasseur* v *Krupp* (3), Jessel, M. R., upon the application of the Mikado of Japan, made that sovereign a party defendant under the English

(1) See the case reported on appeal, I. L. R., 12 Calc., 642.

(2) I. L. R., 5 Calc., 882.

(3) L. R., 9 Ch. Div., 351.

rule corresponding to this section" (*i. e.* order XVI, rule 13) " and in *Khadarsaheb* v. *Chotibibi* (1), and *Vydianàdàyyan* v. *Sitaràmàyyan* (2) orders making persons defendants on their own application under s. 32 were affirmed. A similar order was made by Bayley, J., in *Ahmedbhoy Hubibhoy* v. *Vullèebhoy Cassumbhoy* (3), where that learned Judge refers to *Campbell* v. *Holyland* (4), where after decree in a foreclosure suit Jessel, M. R., made the purchasers after decree of the mortgagee's interest parties defendants upon their application, made *ex parte*; and also, upon the same application made a purchaser of the mortgagee's interest party defendant." We entirely agree with this judgment and have no hesitation in holding that a Court may, in the exercise of its discretion, add a party to a suit upon his own application.

K. M. C. *Rule discharged.*

Before Mr. Justice Mitter and Mr. Justice Grant.

HUKUM CHAND ASWAL (DECREE-HOLDER) *v.* GYANENDRA CHUNDER LAHIRI (MINOR) BY HIS GUARDIAN ABHAI CHUNDER BAGCHI (JUDGMENT-DEBTOR).*

1886 *April* 1.

Foreign Court, Decree of—Execution of decree—Jurisdiction—Court of Cooch Behar, Decree of.

The Courts of British India have no power to execute a decree passed by the Court of a Foreign State.

A decree of the Civil Court of Cooch Behar having been transferred for execution to the District of Rungpore: *held* that the Courts of Rungpore had no jurisdiction to execute the decree.

THIS was a proceeding in execution of a decree of the Civil Court of Cooch Behar. The decree-holder had applied for and obtained a certificate for the execution of the decree within the district of Rungpore. The certificate was sent to the Munsiff of Gaibanda, who dismissed the application on the ground that the decree was barred by time. The Subordinate Judge concurred in that order.

* Appeal from Appellate Order No. 442 of 1885, against the order of Baboo Hemango Chunder Bose, Rai Bahadur, Subordinate Judge of Rungpore, dated the 3rd of October 1885, affirming the order of Baboo Kristadhan Chowdhuri, Rai Bahadur, Munsiff of Gaibanda, dated the 3rd of August 1884.

(1) I. L. R., 8 Bom., 616.
(2) I. L. R., 5 Mad., 52.
(3) I. L. R., 8 Bom., 323.
(4) L. R., 7 Ch. Div., 166.

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An appeal was preferred to the High Court.

Baboo *Durga Mohun Das* for the appellant.

Baboo *Grija Sunkar Mozoomdar* for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows:—

MITTER, J.—This is an appeal against the decisions of the lower Courts passed in execution of a decree which was transferred from the Civil Court in Cooch Behar.

The lower Courts have decided that the decree is barred by limitation, but we are of opinion that they had no jurisdiction to execute the decree in question. There is no provision in the Code of Civil Procedure under which a Court in British India is competent to execute a decree transferred to it by any Court in a Native State out of British India.

That being so, the decree-holder, who is the appellant before us, has mistaken his remedy. The application for execution should have been dismissed on the ground that the Courts in British India have no power to execute a decree passed by the Courts of a Foreign State.

The appeal will therefore be dismissed with costs.

K. M. C. *Appeal dismissed.*

Before Mr. Justice Mitter and Mr Justice Grant.

1886 *April 8.*

PRANNATH SHAHA AND ANOTHER (PLAINTIFFS) *v.* MADHU KHULU AND OTHERS (DEFENDANTS.)*

Landlord and Tenant—Suit for ejectment—Cause of action—Landlords' title, Denial of—Written statement.

P and *R* brought a suit for ejectment on the allegation that their tenants had failed to come to a settlement in respect of a certain *jote*, and that a notice to quit had thereupon been served on them. The defendants (tenants) in their written statement denied the landlords' title. The lower Courts found that the *jote* belonged to the plaintiffs, and the defendants had been and still were in possession of the same as tenants; but dismissed the suit on the ground that the service of notice had not been proved.

Held (on second appeal) that, inasmuch as the cause of action must be based on something that accrued antecedent to the suit, the denial by the

* Appeal from Appellate Decree No. 2095 of 1885 against the decree of G. G. Dey, Esq., Judge of Pubna and Bograh, dated the 13th of August 1885, affirming the decree of Baboo Bepin Behari Mukherji, Munsiff of Pubna, dated the 2nd of April 1885.

defendants of their landlords' title in the written statement would not entitle the plaintiffs to a decree on the ground of forfeiture.

ON the facts stated as above, it was contended before the High Court, on the authorities of *Suttyabhama Dassee* v. *Krishna Chunder Chatterjee* (1), *Ishan Chunder Chattopadhya* v. *Shama Churn Dutt* (2), and *Baba* v. *Vishvanath Joshi* (3), that the defendants, by denying the title of the plaintiffs (appellants), had forfeited their tenancy, and proof of service of notice being, under the circumstances, immaterial, the plaintiffs were entitled to a decree.

Baboo *Kishori Mohun Rai*, for the appellants.

Baboo *Jadab Chunder Seal*, for the respondents.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J.—This was a suit brought by the plaintiffs to recover possession of a piece of land which it is alleged was held by the defendants as their tenants.

The plaintiffs alleged that they called upon the defendants to come to a settlement with them in respect of the said land, and they say, as the defendants have refused to do so, they are entitled to evict them and get *khas* possession. They also alleged that they served the defendants with a notice to quit.

The Courts below have dismissed the plaintiffs' suit upon the ground that no notice to quit is proved to have been served upon the defendants.

It is contended before us that the Courts below were not right in dismissing the suit upon that ground, because the defendants in this case alleged that they were not the tenants of the plaintiffs; and if it were found that they were not, no notice to quit would have been necessary.

We are of opinion that this contention is not valid. If it should be found that the defendants were not the tenants of the plaintiffs, the plaintiffs' suit would be liable to be dismissed upon the ground that they have not established any cause of

(1) I. L. R., 6 Calc., 55. (2) I. L. R., 10 Calc., 41.
(3) I. L. R., 8 Bom., 228.

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action. Their cause of action was that the defendants were their tenants; that they called upon the defendants to settle for the lands; that they refused to do so; that they then served upon them a notice to quit; and that, as they have not quitted the land, the plaintiffs are entitled to evict them and get *khas* possession, so that, if it were once found that the defendants were not the plaintiffs' tenants, their plaint as framed would disclose no cause of action against the defendants for possession.

It was contended before us that the plaintiffs might have been able to prove some other cause of action at the trial. But the answer to that is, that they would not be allowed to prove a cause of action different from the one set up in the plaint.

In point of fact, no other cause of action was alleged or proved upon the evidence that was taken. We asked the learned pleader, who argued the case before us, to point out any evidence showing that the plaintiffs were in possession otherwise than through the defendants as their tenants, but he admitted that there was no such evidence. Consequently, we may take it that the plaintiffs attempted to prove the cause of action which they set up, and *that* they could not do unless it were proved that notice had been served upon the defendants.

It was further contended that, although no notice was served upon the defendants, the plaintiffs were still entitled to a decree for ejectment, inasmuch as the defendants had, by their conduct in denying in their written statement the plaintiffs' title, forfeited their tenant right.

We are of opinion that this contention also is not valid. The plaintiffs' cause of action must be based on something that accrued antecedent to the suit. The fact that the defendants in their written statement denied their tenancy under the plaintiffs would not give the plaintiffs a cause of action upon which to found their suit.

The learned Vakil for the appellant referred us to three cases in support of his contention. The first is *Suttyabhama Dassee* v. *Krishna Chunder Chatterjee* (1). The cause of action in that case was, that the defendant, the tenant, had denied the landlord's title before the institution of the suit, and the Munsiff, upon the evidence adduced in that case, found that to be the case, and this

(1) I. L. R., 6 Calc., 55.

Court, in confirming the Munsiff's decision, held that this denial of the landlord's title gave the landlord a right to evict the tenant. It is true that the Judges who decided that case also refer to the further denial of the plaintiff's, the landlord's, title contained in the written statement, but that was done merely with the view of showing that the conduct of the defendant had been throughout such that the Court could not take an equitable view of the case and interfere to prevent the forfeiture which he had incurred by denying his landlord's title from taking effect. The next case is *Ishan Chunder Chattopadhya* v. *Shama Churn Dutt* (1). There, the denial was by one of four defendants, and the learned Chief Justice, in delivering judgment, held that the denial by that one defendant was made on behalf of all, and that it therefore gave the plaintiff, the landlord, a right to bring a suit, upon that denial, against them all. The last is *Baba* v. *Vishvanath Joshi* (2), but that case does not touch the point now before us, which is, whether the denial of a landlord's title by way of defence to an action of ejectment works a forfeiture. That case was decided upon the ground that, as the defendant had set up a permanent title, and had failed to prove it, the landlord was entitled to recover possession. No question of the defendant (the tenant) having forfeited his right in the tenure by denying the landlord's title in his written statement was raised or decided in that case.

We are, therefore, of opinion that these cases do not support the contention of the learned Vakil.

The appeal will be dismissed with costs.

K. M. C. *Appeal dismissed.*

(1) I. L. R., 10 Calc., 41.
(2) I. L. R., 8 Bom., 228.

Before Mr. Justice Mitter and Mr. Justice Grant.

1886
April 13.

ABIRUNNISSA KHATOON (PETITIONER) *v.* KOMURUNNISSA KHATOON AND OTHERS (OPPOSITE PARTIES).°

Appeal—Civil Procedure Code, ss. 32 *and* 588, *cl.* 2—*Order rejecting application to be made a party.*

An order rejecting an application under s. 32 of the Civil Procedure Code to be made a party to a suit is not appealable under cl. 2, s. 588.

ABIRUNNISSA KHATOON made an application to the Subordinate Judge of Pubna that she might be added as a party to a suit pending in the Court. The petitioner represented that the subject-matter of the suit related to the estate of her deceased father, Fakruldin Ahmed, and she, being an heiress under the Mahomedan law, was a necessary party.

The Subordinate Judge passed the following order rejecting the application: "Unless I go into the merits of the case I cannot make the applicant a co-defendant against the will of the plaintiffs. As yet it does not clearly appear whether or not the petitioner is a necessary party in order to enable the Court to adjudicate more completely and effectually on the questions involved in this case."

The petitioner appealed to the High Court.

Mr. *Bonnaud* (with him Moulvie *Mohammed Yusuf*) for the appellants, referred to *Ghunrani* v. *Raj Coomar* (1). Although cl. 2, s. 588 mentions only the striking out or adding the name of a plaintiff or defendant, it has been held that an order made under s. 32 refusing to make an applicant a party to a suit is appealable.

Mr. *Bonnerjee* (with him Mr. *Gasper* and Mr. *O'Kinealy*) for the respondents, were not called upon.

The judgment of the Court (MITTER, and GRANT, JJ.) was delivered by

MITTER, J.—We are of opinion that there is no appeal in this case. All orders made under s. 32 of the Code of Civil

° Appeal from Order No. 7 of 1886, against the order of Baboo Nilmani Das, Subordinate Judge of Pubna, dated the 5th of October 1885.

(1) All. W. Notes 55, Broughton's Notes of Cases, 624.

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Procedure are not appealable by the 2nd clause of s. 588, but only orders striking out or adding the name of any person as plaintiff or defendant. As the order against which this appeal has been preferred does not come within the purview of this clause, we think there is no appeal. The appeal is rejected with costs.

K. M. C. *Appeal dismissed.*

Before Mr. Justice Mitter and Mr. Justice Grant.

1886 *April* 14.

SHARAT SUNDARI DABIA (DEFENDANT) *v.* BHOBO PERSHAD KHAN CHOWDHURI (MINOR) BY HIS MOTHER RAM SUKHI DABIA AND ANOTHER (PLAINTIFFS).*

Limitation Act, 1877, *Art.* 144—*Ijardar, Dispossession of—Adverse possession —Zemindar, Suit by.*

Possession taken by a trespasser during the currency of an *ijara* lease does not become adverse to the zemindar (lessor) until upon the expiration of the term, and a suit for possession may be brought within 12 years of that date under the provisions of Art 144 of the Limitation Act.

Krishna Gobind Dhur v. *Hari Churn Dhur* (1) followed.

THIS suit which was one for recovery of possession of an 8 anna share of two mouzahs, was instituted on the 5th Aughran 1291 B.S. (19th November 1884). It was alleged that the plaintiff's predecessors in title had granted an *ijara* of the property to one Mr. Brodie, who remained in possession till 1285 B.S., (1878) the end of the term of his lease, and that ever since the month of Joisto 1286 B.S. (May—June 1879) the plaintiff had been wrongfully kept out of the land. The defendant, among other things, pleaded that she having been in exclusive possession of the land since the month of Joisto 1276 B.S., (May—June 1869) the plaintiff's claim, if any, was barred by lapse of time.

The Subordinate Judge decreed the suit, and held upon the authorities of *Krishna Gobind Dhur* v. *Hari Churn Dhur* (1) and *Woomesh Chunder Goopto* v. *Raj Narain Roy* (2), that

* Appeal from Appellate Decree No. 2275 of 1885, against the decree of J. F. Stevens, Esq., Judge of Mymensingh, dated the 18th of August 1885, affirming the decree of Baboo Rajendra Coomar Bose, Subordinate Judge of that district, dated the 30th of March 1885.

(1) I. L. R., 9 Calc., 367. (2) 10 W. R., 15.

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although the plaintiff's *ijardar* had been dispossessed by the defendant in 1278 B.S., (1871) the limitation as against the plaintiff would not begin to run until upon the expiration of the *ijara* lease. The judge confirmed the decree.

The defendant appealed to the High Court.

Baboo *Srinath Das* and Baboo *Kishori Lall Sircar* for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Girija Sunkar Mozumdar* for the respondent.

The judgment the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J.—The plaintiff seeks to recover possession of an 8-anna share of two mouzahs, alleging that the said share appertains to his zemindari No. 6100, and that the defendant, who is the owner of the other 8 annas, is in wrongful possession of the whole. He further alleges that his zemindari was let out in *ijara*; that the *ijara* lease terminated in the year 1285; and that on the termination of that lease he was dispossessed from the disputed land in the beginning of 1286.

The defendant denied the plaintiff's allegation that he was dispossessed in 1286, and alleged that these two mouzahs constituted the holding of one Goluck in the defendant's zemindari, and that in execution of a rent decree this tenure was sold and purchased by him, the defendant, in the year 1276. He therefore contended that the plaintiff's suit was barred by limitation, and that he was entitled to retain possession of the sixteen annas of the lands of these two mouzahs.

The lower Courts decreed the plaintiff's claim. They found that the 8 annas share of the two mouzahs appertains to the plaintiff's zemindari No. 6100, but they were of opinion that the dispossession of the plaintiff's *ijardar* took place in the year 1278, when the plaintiff's zemindari was in *ijara* to Mr. Brodie, and that the *ijara* terminated in the year 1285. They accordingly decreed the suit, holding that, as it was brought within twelve years of the termination of that *ijara*, at which period the plaintiff's cause of action accrued, it was not barred.

It is contended before us that this decision is erroneous in law; that the cause of action in this case accrued to the plaintiff when possession was taken by the defendant in the year 1278, and that as the present suit was not brought within twelve years of that date it was barred by limitation. It was contended, on the other hand, that the dispossession of the *ijardar* was not the dispossession of the zemindar.

Various rulings of this Court have been cited before us. It appears that there is a conflict of decisions in this Court on this point. The latest ruling—*Krishna Gobind Dhur* v. *Hari Churn Dhur* (1)—is in favor of the view taken by the lower Courts. It follows an earlier ruling—*Woomesh Chunder Goopto* v. *Raj Narain Roy* (2). Having considered these and the other cases to which we were referred, we are of opinion that the view taken by the lower Courts on this point is correct. For the reasons given in *Krishna Gobind Dhur* v. *Hari Churn Dhur* (1) we are of opinion that the present case is governed by Art. 144 of the Limitation Act; and that as the adverse possession of the defendant against the plaintiff commenced only on the termination of the *ijara* lease, within twelve years of the suit, the suit is not barred.

Another point has been raised before us, that the plaintiff was not at any rate entitled to *khas* possession.

I was under the impression when the case was being argued that the defendant set up a tenancy under both zemindaris: but even if it were so, the lower Courts would have been right in decreeing the suit, because it was not proved that the tenure was transferable. But Babóo Srinath Das, who appears for the appellant, informs us that the defendant alleged that the tenure was held under the defendant's zemindari only. In that view the question of transferability does not arise. The 8 annas share of the disputed land being found to be part and parcel of the zemindari, and the claim not being barred by limitation, there is no defence to the suit.

The lower Courts were therefore right in awarding a decree in favor of the plaintiff. We dismiss the appeal with costs.

K. M. C. *Appeal dismissed.*

(1) I. L. R., 9 Calc., 367.

(2) 10 W. R., 15.

FULL BENCH.

Before Sir W. C. Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson, and Mr. Justice O'Kinealy.

1886 *May* 5.

BANI MADHUB MITTER (PLAINTIFF) *v.* MATUNGINI DASSI AND OTHERS (DEFENDANTS.)

KALI SHUNKAR DASS (PLAINTIFF) *v.* GOPAL CHUNDER DUTT (DEFENDANT.)*

Limitation Act (XV of 1877), *s.* 12, *Sch. II, Art.* 152—*Exclusion of time between delivery of judgment and signing decree—Civil Procedure Code, (Act XIV of* 1882), *s.* 205.

Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under s. 12 of the Limitation Act to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting his appeal.

THE question raised in these two appeals was, whether or no they were filed within time. The cases came on for hearing before Mitter and Macpherson, JJ., who, considering that the case of *In re Chowdhry Mohendro Narain Roy* (1) conflicted to some extent with the case of *Ramey* v. *Broughton* (2), referred the question to a Full Bench.

With reference to the points raised the following facts are material:—

In Special Appeal No. 2065 of 1884 the date of the Munsiff's judgment was the 17th July 1883.

The date on which the original decree was signed was the 23rd July 1883.

The date on which the application for copy of the decree was made was the 3rd August 1883.

The date on which the copy of the decree was ready for delivery was the 11th August 1883.

* Full Bench on Special Appeals Nos. 2065 of 1884 and 534 of 1885 from the decisions of the Judge of Zillah 24-Pergunnahs, dated respectively 22nd July 1884 and 26th of February 1885, affirming the decrees respectively of the First Munsiff of Baraset and the Third Munsiff of Alipur, dated respectively the 17th July 1883 and 27th February 1884.

(1) 18 W. R., 512. (2) I. L. R., 10 Calc., 652.

The date on which the appeal was filed was the 30th August 1883.

In Special Appeal No. 534 of 1885 the date of the Munsiff's judgment was the 27th February 1884.

The date of application for a copy of the decree was made on the 29th February 1884.

The date on which the original decree was signed was the 4th March 1884.

The date on which the copy was ready and delivered was the 7th March 1884.

The date on which the appeal was filed was the 7th April 1884, the 6th April being a Sunday.

Baboo *Bhobani Charan Dutt* for the appellant in Special Appeal No. 2065.—The question is what is the meaning of the words "time requisite for obtaining a copy" in s. 12 of the Limitation Act. As to this *see Chowdhry Mohendro Narain Roy, In re* (1) where the time between the date on which judgment was pronounced and that on which the decree was signed was allowed; that decision was under Act VIII of 1859, s. 333. Subsequent provisions for the limitation of appeals have been re-enacted in the Limitation Acts, which contain words to the same effect as those in s. 333. If the Legislature had not approved of Phear, J.'s decision in *Chowdhry Mohendro Narain Roy's* case some alteration would have been made. Article 152 of the Limitation Act of 1877 declares that limitation shall run "from the date of the decree appealed against," but nowhere in that Act is the date of the decree defined to be the date on which the decree comes into existence. I submit the "date of the decree" in Article 152 means the date on which the decree was actually prepared and signed.

Baboo *Guru Das Banerjee* (with him Baboo *Aubinash Chunder Banerjee*) for the respondent.—Section 205 of Act XIV of 1882 defines "the date of the decree." The language of s. 12 of the Limitation Act of 1877 supports my contention that time runs from the date of the judgment—*see Ramey* v. *Broughton* (2). Article 152 of the Limitation Act must be read subject to s. 205 of the Code.

(1) 18 W. R., 512. (2) I. L. R., 10 Calc. 652.

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BANI MADHUB MITTER v. MATUNGINI DASSI.

Baboo *Dwarka Nath Chuckerbutty* for the appellant in special appeal 534.

Baboo *Jogendro Chunder Ghose* for the respondent.

The opinion of the Full Bench was delivered by

PETHERAM, C.J.—The reference in these two cases involves the question of the construction of s. 12 of the Limitation Act read along with Article 152 of the second schedule of the same Act.

Article 152 limits the time for an appeal under the Code of Civil Procedure to the District Judge to 30 days from the date of the decree or order appealed against; and the question is, from what date is this period to be computed?

The first question is, what is the date of the decree, and for the purpose of ascertaining that, it is necessary to look at s. 205 of the Code of Civil Procedure. By that section it is provided that a "decree shall bear date the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree," so that whatever may be the day on which the actual signature is made, the date of the decree, for all purposes, is to be the date on which the judgment was pronounced.

Bearing that in mind, and also bearing in mind that under s. 541 of the Code of Civil Procedure, it is necessary that the Memorandum of Appeal shall be accompanied with a copy of the decree, it would be unfair to compute the period of limitation, in all cases, from the date on which the judgment was delivered, because it is obvious that things may intervene so as to prevent the decree being signed until after the expiration of the whole period of 30 days allowed for preferring the appeal, and so the appeal may be rendered impossible without any fault of the parties; and therefore s. 12 of the Act provides that in computing this period of 30 days, the time requisite for obtaining a copy of the decree appealed against shall be excluded; and the question really in this case is, what is the meaning of these words.

The facts are (taking Special Appeal No. 2065 first) that the judgment was pronounced on the 17th July 1883, and

consequently that is to be taken as the date of the decree. The decree was not in fact signed until the 23rd July, so that until that day the appellant could not have obtained the necessary materials, the copy of the decree, to enable him to appeal. He applied for a copy on the 3rd August and obtained it on the 11th idem, so that he is under s. 12 of the Limitation Act entitled to have these days excluded in computing the time taken in presenting his appeal. The appeal was presented on 30th August, and the period of limitation prescribed—thirty days from the date of the decree—is exceeded even after excluding eight days from the 3rd to 11th August (if it is calculated from the date of the decree itself). But in our opinion the fact that the decree was not in existence, that is signed by the particular Judge, and could not therefore be copied until 23rd July, that is, six days after the date that it bears, entitles the appellant to ask us to deduct those six days in addition to the eight days, and thus to hold that under s. 12 the appeal has been presented within the prescribed period.

In this case, the appellant obtained a copy of the decree (having made his application earlier) on the 11th August 1883, and he filed the appeal on the 30th idem, and was therefore well within time.

As to the other case, the law of course is the same; and at first sight it looks as if the appeal were beyond time, but, on examining the facts, it appears that the last day of the period of limitation was a Sunday, and therefore the time was extended to Monday, the 7th of April; consequently in this case also the questions must be answered in the affirmative, and the appeal must be taken to have been filed in time.

MITTER, J.—The judgment therefore of the lower Appellate Court in these cases will be reversed, and the cases will be remanded to that Court to hear the appeals on the merits.

T. A. P.

CRIMINAL REFERENCE.

Before Mr. Justice Pigot and Mr. Justice Macpherson.

1886
May 27.

IN THE MATTER OF THE CORPORATION OF THE TOWN OF CALCUTTA *v.* MATOO BEWAH AND OTHERS.*

Beng. Act IV of 1876, *s.* 248—*Conviction for keeping animals without license—Continuing offence between date of summons and date of conviction —Second prosecution for same offence on different date.*

Under s. 248 of Bengal Act IV of 1876, a milkman, who has been convicted and fined for keeping an animal without a license, cannot again be prosecuted for the continuance of the same offence before conviction, nor can he be separately prosecuted for the same offence for each day the offence is continued as a separate and distinct offence under that section before conviction.

In a summons taken out on the 27th March against a milkman for an offence under s. 248, Bengal Act IV of 1876, the offence was stated to have been committed on the 16th March ; the case was fixed for the 8th April, when the defendant was convicted and fined by the Magistrate. Another summons had been taken out against him on the same day (27th March) for a similar offence stated to have been committed on the 25th March : *Held*, that he could not be convicted on the second charge.

THE facts stated in the reference were as follows :—

The defendants who are milkmen were prosecuted under a summons taken out by Mr. Rebeiro, overseer, on the part of the Corporation of Calcutta on the 27th March last, under s. 248 of Beng. Act IV of 1876. The application stated that the offence was committed on 16th March, and the case was fixed for hearing on the 8th April, when it came on for hearing before the Presidency Magistrate who convicted them and fined them Rs. 8, Rs. 12 and Rs. 15 respectively.

Prior to the trial of this case a summons was also taken out against them on the same date, *i.e.*, 27th March, by Mr. George, inspector, on the part of the Corporation, under the same section.

The application stated that the offence was committed on 25th March, and the case was fixed for hearing on 10th April. When the case came on for trial before the Honorary Magistrate, he

* Criminal Reference No. 2 of 1886 has been referred to by Baboo Aushootosh Dhur, one of the Justices of the Peace for the Corporation of the Town of Calcutta, dated the 16th April 1886.

entertained doubt as to whether the defendants could be tried on the second summons taken out against them, pending the first summons and before its disposal. It was contended on behalf of the Corporation that there were two distinct offences, one committed on the 16th March and the other on the 25th, and that the conviction on the first summons was no bar to the trial of the defendants under the second summons. The Honorary Magistrate, however, was of opinion that s. 248 contemplated one substantive offence for keeping animals without license, and the fine not exceeding Rs. 100 covered the offence committed up to the date of conviction, and that the defendants could not be prosecuted for the same offence committed between the date of the first summons and the conviction on it; but at the request of the Corporation he referred for the opinion of the High Court the following questions:—

1. Whether, under s. 248 of Beng. Act IV of 1876, a milkman who keeps any animal without such license as is mentioned therein, and who has been convicted and fined under that section by the Magistrate, can again be prosecuted for the continuance of the same offence before the date of such conviction.

2. Whether, under s. 248 of Beng. Act IV of 1876, a milkman who keeps any animal without such license as is mentioned therein, can be separately prosecuted for the same offence for each day the offence is continued, as a separate and distinct offence under that section before conviction.

The parties were not represented on the hearing of the reference by the High Court.

The opinion of the Court (PIGOT and MACPHERSON, JJ.) was as follows:—

We are of opinion that both questions should be answered in the negative. The section contemplates one offence and one prosecution, a conviction upon which is to involve a liability to fine not exceeding Rs. 100 and to a further fine not exceeding Rs. 20 for each day during which the offence is continued.

In *Garrett* v. *Messenger* (1) the offence was the keeping a house for public dancing, &c., without a license, and the section under which the prosecution was instituted provided that

(1) L. R. 2 C. P., 583.

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IN THE MATTER OF THE CORPORATION OF THE TOWN OF CALCUTTA v. MATOO BEWAH.

"every person keeping such house, &c., without such license as aforesaid, shall forfeit the sum of £100 to such person as will sue for the same." Two actions were brought under the Act by common informers, each to recover a penalty of £100. A verdict was taken in the first, and in the second, Wills, J., held that the penal powers of the Act were exhausted by the recovery of one penalty: the full Court concurred in this view, Bovill, C.J., saying that, if the Legislature had intended that there should be more than one penalty, that intention would no doubt have been expressed in clear and unequivocal terms. That case was referred to in *Milnes* v. *Bale* (1), where the distinction is pointed out between cases where a penalty is imposed in respect of a complex and continuous act, and those where it is imposed in respect of a simple uncomplicated offence which is complete.

In this case, the keeping of animals without a license is, as in the case of *Garrett* v. *Messenger*, the keeping a house of entertainment without a license was, a comprehensive offence to be proved by many acts, all of which constitute only one offence for which only one penalty is recoverable—that penalty being a fine not exceeding Rs. 100, and such further fine as may be imposed; those of the acts done which are committed after summons and before conviction must be treated as part of it.

We therefore answer both questions submitted to us by the Magistrate in the negative.

J. V. W.

CRIMINAL REVISION.

Before Mr. Justice Norris and Mr. Justice Macpherson.

1886 *May* 20.

IN THE MATTER OF THE PETITION OF RAM DAS MAGHI AND ANOTHER.*

Judgment—Form and contents of judgment—Criminal appeal to Magistrate—Criminal Procedure Code, 1882, *ss.* 367, 424.

A Magistrate, after hearing an appeal from the Deputy Magistrate, gave the following judgment: "I see no reason to distrust the finding of the lower

* Criminal Revision No. 192 of 1886, against the order passed by A. Boruah, Esq., Magistrate of Bogra, dated the 24th of March 1886, modifying the order passed by A. C. Chaterji, Esq, Deputy Magistrate of Bogra, dated the 19th of March 1886.

(1) L. R., 10 C. P., 595 and 597.

Court. The sentence passed however appears harsh. I reduce the term of imprisonment to fifteen days. The fines and terms of imprisonment in default will stand." *Held*, following the decision in *Kamruddin Dai* v. *Sonaton Mandal* (1) that it was not a judgment within the meaning of ss. 367 and 424 of the Criminal Procedure Code.

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IN THE MATTER OF THE PETITION OF RAM DAS MAGHI.

THIS case merely followed the decision in *Kamruddin Dai* v. *Sonaton Mandal* (1), holding on the authority of that case that the judgment given by the Magistrate was not a judgment in accordance with ss. 367 and 424 of the Code. The Court ordered the judgment to be set aside and directed that the appeal should be reheard.

Baboo *Iswar Chandra Chakrabati* for petitioners.

Baboo *Durga Mohun Das* for opposite party.

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Beverley.

O. STEEL & CO. (DECREE-HOLDERS) *v.* ICHCHAMOYI CHOWDHRAIN AND ANOTHER (JUDGMENT-DEBTORS.)*

1886 *March* 18.

Appeal—Order staying execution of Decree—Civil Procedure Code, 1882, *ss.* 2, 243, 244—*Decree.*

An order under s. 243 of the Civil Procedure Code staying execution of a decree determines a question relating to the execution of the decree within the meaning of s. 244, and is therefore a decree within the meaning of s. 2: an appeal therefore lies from such order.

IN proceedings in execution of a decree the judgment-debtors applied for stay of execution on giving security, on the ground that they had, in the same Court in which the execution proceedings were being carried on, brought a suit against the decree-holders for possession and mesne profits of the land in connection with the suit in which the decree under execution had been obtained. The Subordinate Judge made an order on the application that the execution proceedings should be stayed, but as the day the

* Appeal from Order No. 384 of 1885, against the order of Baboo Ram Coomar Pal Chowdhuri, Subordinate Judge of Sylhet, dated the 3rd of September 1885.

(1) I. L. R., 11 Calc., 449.

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application was filed was the very day fixed for the execution sale, and the decree-holder had been put to considerable cost in enforcing the decree, the Subordinate Judge ordered the judgment-debtor to pay Rs. 300 in part satisfaction, as well as to give security for payment of the remaining amount.

From this order the decree-holders appealed, and a preliminary objection was taken that no appeal lay.

Mr. *Adkin* for the appellants.

Baboo *Jogesh Chundra Roy* for the respondents.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

This is an appeal against an order passed under s. 243 of the Civil Procedure Code. A preliminary objection has been taken that no appeal will lie against an order made under that section, and we have been referred to a decision to that effect in *Nihal Chand* v. *Rameshari Dassee* (1). We are not disposed to follow that decision, partly because we think that, under the definition of decree in s. 2 of the Civil Procedure Code, the order made under s. 243 did determine a question mentioned or referred to in s. 244 *viz.*, a question relating to the execution of the decree; that is to say, the order determined the question whether the decree should be executed or whether execution should be stayed. In support of this view we find several reported decisions—*Kristomohiney Dassee* v. *Bama Churn Nag Chowdhry* (2), *Luchmeeput Singh* v. *Sitanath Doss* (3), and *Ghazidin* v. *Fakir Baksh* (4). We are also aware of other decisions to the same effect which have not been reported. On the other hand, the case to which we have been referred is, so far as we are aware, the only one to the opposite effect, and the reasons given therein do not altogether commend themselves to us. Then, on the merits, it appears that the decree in this case was on account of costs which were decreed to the appellants in consequence of the respondent's failure in a previous suit in respect of the same matter. The respondent was allowed liberty to bring a fresh suit, and the costs of the previous proceedings were given against

(1) I. L. R., 9 Calc., 214.
(2) I. L. R., 7 Calc., 733.
(3) I. L. R., 8 Calc., 477.
(4) I. L. R., 7 All., 73.

him. But apparently by some oversight it was not made a condition, as it usually is in such cases, that payment of the costs should be a condition precedent to the institution of the fresh suit. We think, however, that this was a case in which it was incumbent upon the Court to see that the costs were paid within a reasonable time, and not a case in which further time should be given merely because a fresh suit has been instituted. We, therefore, set aside the order of the lower Court staying the execution proceedings, and direct that these proceedings do proceed. The appellants will be entitled to their costs in this Court.

J. V. W. *Appeal allowed.*

Before Mr. Justice Mitter and Mr. Justice Agnew.

BHOBANI MAHTO (PLAINTIFF) *v.* SHIBNATH PARA (DEFENDANT.)*

1886 *March* 25.

Registration Act (XX of 1866), *s.* 17, *cl.* 4—*Zur-i-peshgi lease*—"*Leases not exceeding one year,*" *Meaning of.*

Leases which were exempted from the operation of s. 17, cl. 4, Act XX of 1866, were leases the term of which was one year certain.

Where a *zur-i-peshgi* lease was granted for one year, but with a stipulation that unless the loan were repaid within that time it should continue in force, *held*, that such a lease came within the words of s. 17, cl. 4, Act XX of 1866, "leases of immovable property for any term exceeding one year" of which registration was compulsory.

THIS was a suit for arrears of rent. The plaintiff based his claim upon an unregistered *zur-i-peshgi* lease which, though it purported to be for the term of one year, contained a stipulation that the lease should remain in force until the loan was repaid. Both the lower Courts agreed in holding that the document was one of which registration was necessary under s. 17, cl. 4, Act XX of 1866, and refused to admit it in evidence.

On appeal to the High Court it was contended that the lease did not require to be registered.

* Appeal from Appellate Decree No. 2021 of 1885, against the decree of Moulvie Mahomed Nurul Hossein, Subordinate Judge of Sarun, dated the 6th of August 1885, reversing the decree of Baboo Harihar Charan, Munsiff of Chuprah, dated the 1st of December 1884.

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BHOBANI MAHTO v. SHIBNATH PARA.

Baboo *Rajendra Nath Bose* for the appellants.

Baboo *Dwarka Nath Chuckerbutty* for the respondent.

The judgment of the Court (MITTER and AGNEW, JJ.) was as follows:—

The question raised in this case is whether the *zur-i-peshgi* lease upon which the plaintiff relied is a lease which required registration. It was executed in September 1866. The Registration Act then in force was Act XX of 1866. Section 17 says: "Instruments next hereinafter mentioned will be registered." And the 4th clause is to this effect: "Leases of immoveable property for any term exceeding one year." The question before us is, whether the lease in this case was for any term exceeding one year. The lease was a *zur-i-peshgi* lease granted on the advance of a loan, and it is stipulated therein that it was in the first place to remain in force for one year; but then it goes on to provide that if the loan is not repaid it will continue in force; and the question therefore for our consideration is, whether a lease of this description comes within the words "leases of immoveable property for any term exceeding one year." We think it does. It appears to us that the leases which were intended to be excluded from this 4th clause were leases the term of which was one year certain. In this case the condition was that if the *zur-i-peshgi* money was not repaid the lease was to continue in force until the money was repaid, and therefore the term might exceed one year. The lease might, in fact, be in force for many years. So long as the money is not repaid it would not come to an end.

We think, therefore, that the Subordinate Judge was right in holding that the lease upon which the plaintiff relies required registration under Act XX of 1866.

We dismiss this appeal with costs.

K. M. C. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

CARRISON (PLAINTIFF) *v.* RODRIGUES AND OTHERS (DEFENDANTS.)*

1886
April 21.

Compromise—Compromise made notwithstanding dissent of client—Counsel's powers to compromise—Consent decree set aside.

Where Counsel, after consulting with his attorney and client as to the advisability of compromising a case, and after receiving instructions from the attorney "to do the best he could for his client," compromised the case, notwithstanding the express prohibition of the client; and the client before the consent decree was drawn up notified her dissent to the other side: *Held* that the consent decree must be set aside.

THIS was an an application to set aside a compromise.

The suit, which was one for the construction of a will and for certain other relief, was, after the first day's hearing on which one issue was disposed of, and after an adjournment of two weeks, compromised, and a decree passed in accordance with such compromise, both sides being represented by counsel.

On the day following the compromise the plaintiff's attorney wrote to the Registrar of the Court desiring him not to draw up the decree, as the plaintiff dissented from the compromise, and five days later, but at a time when no decree was drawn up, direct notice was given to the defendant's attorney of the plaintiff's dissent.

The affidavit filed by the plaintiff in support of her application stated the following facts, omitting matters which are immaterial to this report:—

That on the second day's hearing, on the 11th March, the defendant's attorney suggested certain terms of settlement to plaintiff's counsel, to which terms the plaintiff declined to agree, expressing her intention to fight out the case; that on the 30th March the case appeared in the peremptory board, and was called on for hearing, when it was suggested by defendant's counsel that the learned Judge presiding might possibly assist at effecting a compromise; that the learned Judge and counsel on both sides retired to the Judge's room, and discussed certain terms of settlement;

* Original Civil Suit No. 391 of 1885.

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that on the termination of their consultation, the plaintiff's counsel strenuously advised the plaintiff to settle the case; that the plaintiff protested against certain of the terms, and that the plaintiff's attorney shortly after joined the consultation, and sided with his counsel in endeavouring to get the plaintiff to consent to the compromise; that the plaintiff, however, refused to consent, and that on the attorney instructing counsel "to do his best for the plaintiff," the plaintiff again explained to her counsel that she refused to compromise; that after this consultation counsel went back to the private room of the learned Judge, and, after some consultation, the learned Judge and counsel returned to Court, when a written paper was handed up to the Court, which purported to compromise the case, the plaintiff however not having seen the paper or having had it explained to her; and that an order was made in terms of the settlement put in. That subsequent to the compromise, the plaintiff, after learning the terms thereof, still expressed her unwillingness to be bound thereby; and on the day following appeared in Court, and informed the Court that she disapproved of the manner in which the case had been disposed of.

Mr. *Pugh* and Mr. *Garth* appeared for the defendants.

Mr. *Pugh*.—The attorney had power to instruct counsel as he did. The compromise cannot be set aside by this application. On the authority of attorneys to settle see *Pritswick* v. *Poley* (1), where it was held that, in the absence of a distinct prohibition from the client, he may settle. In *Fray* v. *Voules* (2), it is held that an attorney cannot compromise when expressly forbidden to do so, even if it be for the benefit of the client; but that if he does so, the compromise, although perhaps binding as between him and third parties, is *ultra vires* as between him and his client. In *Butler* v. *Knight* (3), the client expressly told the attorney not to compromise and he did so notwithstanding. On the other hand, *Strauss* v. *Francis* (4) lays down that counsel can compromise notwithstanding dissent of client unless the dissent is brought to

(1) 34 L. J. C. P., 189.
(2) 28 L. J. Q. B., 232; 1 E. and E., 839.
(3) L. R. 2 Ex., 109.
(4) L. R., 1 Q. B., 379.

notice of the opposite party at the time. In *Swinfen* v. *Swinfen* (1) it was held that counsel, if instructed by attorney, can consent to a compromise, and the Court will not inquire into the existence or extent of his authority even though the client repudiate counsel's authority to consent. In that case affidavits were made by all the counsel engaged in the case and by the plaintiff's attorney; here the lady's attorney has made no affidavit.

Holt v. *Jessse* (2) is against me as showing that a consent given by counsel in presence of the client may be withdrawn before the order is drawn up, if given through inadvertence. [TREVELYAN, J.—There the Court found that Mr. Jesse expressly consented to the order, see p. 182]. I don't suggest that the plaintiff in this case consented, but I say, she through her attorney instructed counsel to do his best in regard to a compromise.

Mrs. *Carrison* appeared in person and stated that she had never given her consent to the compromise.

TREVELYAN, J.—This is an application to set aside the decree made by consent on 30th March 1886. The facts on which I must act are contained in an affidavit made by the plaintiff and also by Mrs. Westcott, her daughter. I am bound to say at the outset that it is somewhat extraordinary, considering the terms of the affidavit, that the attorney on the record, who was perfectly cognizant of the facts alleged, did not support it. But I do not think that this circumstance, although one would have expected the attorney to come to the assistance of the Court, would justify me in refusing to act. The case came on for hearing for the second time on the 30th March 1886. On a previous occasion I had decided a particular issue, and held that the plaintiff under her husband's will was entitled to the property for life.

When the case was called on, counsel for the defendant, seeing that a continuance of the litigation would involve the disappearance of the property in suit, suggested that I might assist in a compromise. I felt that it was clearly a case which the parties ought to settle. But there was nothing to compel a settlement, and the parties were entitled to a decision if they desired it.

Counsel on both sides then came to my room and we discussed the terms of settlement, which were to a great extent

(1) 26 L. J. C. P., 97 (2) L. R. 3 Ch. D., 177.

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suggested by me, and which appeared to me to be extremely reasonable. So far as I recollect, when we had discussed the terms, connsel for the plaintiff left the room to get his client's consent, and I impressed on him the necessity of his getting her consent. Counsel came back, having explained the matter to his client, and having, as I thought, obtained her consent. Terms were put in and signed by counsel on both sides.

The next day the plaintiff's attorney wrote and repudiated the settlement. (The Court here read Mr. Lewis's letter of the 31st March to the Registrar of the Court). As I understand it, it is not disputed that this dissent was communicated the same day to the defendants. At any rate on the 5th April 1886, six days after the consent decree, express notice of this application was given to the defendants and their attorney, and at that time no decree had been drawn up. Had the decree been drawn up and sealed, it would have been impossible to deal with the case. A long affidavit has been put in; in it Mrs. Carrison says that she declined a settlement throughout, and there can be no doubt that this statement is correct. (Here followed portions of that affidavit).

Several cases have been cited to me, and I think that I must decide in favour of the plaintiff. It may be very hard on the defendants that, when a settlement was formally drawn up by both sides, the matter should be re-opened; but on the other hand, it would be hard to insist upon the plaintiff being bound by a compromise to which she was not an assenting party.

I will cite in passing the remarks of Vice-Chancellor Malins, in *Holt* v. *Jesse* (1), a case in which Jesse was actually in Court at the time of settlement.

"Now I can only say that this is an order which, if Mr. Jesse did not consent to, he ought to have consented to most cheerfully and thankfully; but I am satisfied that he did consent to it. He was present in Court and thoroughly understood it, and he is not, in my opinion, at liberty to withdraw the consent then given." (The plaintiff in the case before me swore that she never at any time consented to any settlement).

"But as much has been said in the course of the argument,

(1) L. R. 3 Ch. D., 177 (182).

and authorities have been cited about the general principles of the Court in withdrawing consents given to orders, I beg to express my opinion, which I believe is in conformity with all the cases that have been cited, that, if it shall turn out that by the inadvertence of counsel, by the careless consent of the plaintiff or defendant himself, not fully knowing or considering what he is about, an order given by consent has prejudiced him in a manner which neither he nor his advisers could have anticipated at the time, such as in the case of *Swinfen* v. *Swinfen* (1), where counsel was instructed to do one thing and consented to a totally different thing; that is, for instance, being instructed to make a claim to an estate in fee simple, he consented that the claimant should have a life estate only, or a tenancy for life; that is entirely beyond his authority, and nothing could be more reasonable than that his client should not be bound by such a consent inadvertently given."

The case of *Strauss* v. *Francis* (2) cited by Mr. Pugh and much relied on is cited by Malins, V. C., in *Holt* v. *Jesse*. If the proposition of Vice-Chancellor Malins is correct, *à fortiori* the suitor is not bound here. Here there is no consent at all, but a careful dissent. It is difficult to say how it came about that counsel consented.

In the case of *Strauss* v. *Francis* (2), the principle is laid down by Blackburn, J.: "We are all agreed that there clearly ought to be no rule. The plaintiff by no means makes out that there was any express dissent on his part to withdrawing a juror; there is nothing on the affidavits to show that the client absolutely withdrew all authority, nor is there anything to show that counsel had done so unprofessional a thing as to undertake the conduct of a cause giving up all discretion as to how he should conduct it; still less is there any thing to show that there was the slightest knowledge on the part of the other side that the apparent general authority of counsel had been in fact limited."

It is true that in this case the defendants had not, at the exact moment of the decree being made, any knowledge that the

(1) 2 De. G. and J., 381; 26 L. J. C. P., 97.
(2) L. R. 1 Q. B. D., 379.

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authority of the plaintiff's counsel had been limited by the plaintiff, but they obtained this knowledge almost immediately, and before the decree was drawn up; for the plaintiff took steps the next day and wrote to the Registrar not to draw up the decree. So far as I can see the plaintiff has repudiated the consent within the time she was entitled to do so. I, therefore, think that I cannot exclude her from going on with her case.

I must allow this case to be retried.

T. A. P. *Consent decree set aside.*

Attorney for plaintiff: Mr. *G. Lewis.*

Attorney for defendant: Mr. *Fink.*

APPELLATE CRIMINAL.

Before Mr. Justice O'Kinealy and Mr. Justice Agnew.

ADYAN SING *v.* QUEEN EMPRESS.*

1886
June 30.

Discharge of accused—Further enquiry and order of commitment passed simultaneously by Sessions Judge—Depositions not read over to accused—Oral evidence—Statement of Mooktear as to faulty record—Criminal Procedure Code (Act X of 1882), *s.* 360—*Evidence Act (I of* 1872), *s.* 91.

A Sessions Judge, after hearing a general statement made by a Mooktear engaged in the case, considered that the depositions of certain witnesses taken in the Magistrate's Court did not conform with the requirements of s. 360 of the Code of Criminal Procedure, and refused to admit the depositions as evidence, and also refused to allow oral evidence to be given as to the statements made by these witnesses. No objection was taken to the admission of these depositions on behalf of the Crown; the accused were eventually convicted and sentenced to rigorous imprisonment. *Held*, on appeal, that the conviction and sentence must be set aside.

ON the 31st December 1885 one Adyan Sing was alleged to have inflicted a severe wound on the arm of one Budhun from which he subsequently died.

The Assistant Magistrate who held an enquiry into the case discharged the accused under ss. 209 and 253 of the Criminal Procedure Code.

The wife of the deceased then applied to the Sessions Judge to have the order of discharge set aside.

The Sessions Judge, on the 11th February, passed the following order: "I think the commitment of the accused on a charge of culpable homicide not amounting to murder should be ordered, but before so ordering, notice should be given to Adyan to show cause why such order should not be passed; if it is passed, I shall also direct the examination of the Inspector, Sub-Inspector, Assistant Surgeon and Sub-Deputy Magistrate." On the hearing of this rule the Sessions Judge passed the following order: "I direct the commitment of the accused; it should be made at once, after taking the additional evidence referred to in my proceedings of the 11th instant in the presence of the accused if possible."

* Criminal Appeal No. 331 of 1886, against the decision of T. M Kirkwood, Esq., Sessions Judge of Patna, dated the 29th March 1886.

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During the course of the trial before the Sessions Judge, Counsel for the accused attempted to contradict the witnesses for the prosecution by putting to them questions as to statements made by them in the Court of the Assistant Magistrate, and tendering their depositions in that Court as evidence against them. The Sessions Judge refused to admit these depositions on the ground, apparently, that a Mooktear, who appeared for the defence and who had conducted the case before the Assistant Magistrate, had told him (the Sessions Judge) that the Assistant Magistrate had not read these depositions over to the witnesses, and that it was the constant practice of the Assistant Magistrate to overlook this provision of s. 360 of the Criminal Procedure Code. Counsel for the accused thereupon applied that the Assistant Magistrate might be examined as a witness in the case, but this application was refused on the ground that oral evidence by the Assistant Magistrate as to what was stated to him by the witnesses could not be received, the recorded depositions being the only proof of those statements under s. 91 of the Evidence Act.

At the conclusion of this trial the Sessions Judge, accepting the opinion of the majority of the jury, convicted the accused of grievous hurt and sentenced him to three years' rigorous imprisonment.

The prisoner appealed.

Mr. *G. Gregory* (with him Baboo *Omirtonauth Bose)* for the appellant contended (1) that the order of commitment by the Sessions Judge simultaneously with the order for fresh evidence to be taken by the Assistant Magistrate was illegal; and on this point cited an unreported case of *In re Dahoo Singh*, decided by Prinsep and Grant, JJ., dated 4th March 1886, Criminal Motion number 96 of 1886, in which Mr. Kirkwood, the same Sessions Judge, had directed further enquiry to be made after the accused had been discharged by the Magistrate, and at the same time directed the accused to show cause why he should not be committed by the Sessions Court; and on the hearing of the rule, ordered the commitment of the accused and directed the Magistrate to take the depositions of two fresh witnesses. On the case coming up before Prinsep and Grant, JJ., they set

aside the order of commitment, remarking: "It seems to us that the Sessions Judge's order amounts to simultaneously directing further enquiry into the alleged offence, and to ordering commitment of the accused. Before the accused could be properly committed, it would be necessary to consider the value of the entire evidence against them, including the evidence which is now to be taken. Under these circumstances, we think the order of commitment was premature; it must accordingly be set aside. The Deputy Magistrate will proceed to carry out the orders of the Sessions Judge regarding further enquiry, and pass such orders therein as may seem to him proper on consideration of the evidence to be taken, and on consideration of the evidence previously taken by him." (2) That the Judge was wrong in not accepting the depositions in evidence; that s. 91 of the Evidence Act did not apply; that if the depositions could not be considered as the depositions of these witnesses by reason of the omission of the Magistrate, then it followed that there was no written record of what the witnesses actually said, and parol evidence was therefore receivable. (3) That the statement of the Mooktear should not have been received by the Judge.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The Court (O'KINEALY and AGNEW, JJ.) passed the following order:—

In this case the prisoner has been convicted of causing grievous hurt and sentenced to three years' rigorous imprisonment and a fine of Rs. 200. On his trial before the Sessions Judge of Patna, whilst certain of the witnesses were under cross-examination, their depositions before the committing officer were tendered in evidence in order to contradict what they were then saying.

No objection was taken to the reception in evidence of these depositions by the Crown; but the Sessions Judge, because a Mooktear in Court, who is said to have conducted the case in the lower Court on behalf of the accused, made a general statement that the committing officer was not in the habit of reading over depositions to the witnesses, himself raised the objection, and

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refused to receive the evidence tendered on behalf of the prisoner. We think that he was wrong in doing so. There was no ground on which he could refuse the depositions. Further, we think that if he had refused them rightly, the prisoner should not have been debarred from calling the Assistant Magistrate for examination.

We set aside the conviction and sentence and direct that the prisoner be re-tried.

Let the depositions, if tendered in evidence, be received.

T. A. P. *Conviction set aside.*

PRIVY COUNCIL.

P. C.*
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February 11, 13, 14, 16.

NAN KARAY PHAW AND OTHERS (PLAINTIFFS) *v.* KO HTAW AH (DEFENDANT).
BY APPEAL.

KO HTAW AH (DEFENDANT) *v.* NAN KARAY PHAW AND OTHERS (PLAINTIFFS).
BY APPEAL.

KO HTAW AH (DEFENDANT) *v.* NAN KARAY PHAW AND OTHERS (PLAINTIFFS).
BY CROSS APPEAL.

[On appeal from the Special Court of British Burmah.]

Account—Set off—Cross appeal.

Of two appeals heard together, the first was brought on the dismissal of a suit, in which the representatives of one, now deceased, of two parties claimed for his estate an account against the other; their suit having been dismissed on failure to prove the contract between the parties; and the second appeal was from a decree between the same parties, for damages for the detention of property which had belonged to the estate of the deceased. In the first, the plaintiffs appealed; and in the second the defendant, who also, by cross appeal, claimed a sum which, as he alleged, would have been found due to him had accounts on both sides been taken in the first of the above suits.

Held, that as the first suit was for an account only, and not for the recovery of money, rendering it at least doubtful whether a set-off could be pleaded in defence; and as, also, no issue had been framed, or even asked for, on the question, it was not open to the defendant to raise it on this cross appeal.

* *Present:* LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR R. COUCH.

APPEALS and cross appeal consolidated and heard together under orders in Council (5th March and 13th June 1885) from two decrees (28th and 8th August 1883) of the Special Court of British Burmah, reversing in one suit, and confirming in another, decrees of the same date (24th April 1882), made in two suits by the Judge of Moulmein.

Two suits, giving rise to the present appeals and cross appeal, were brought on the 11th March 1881, by the representatives, widow and children, of Phatadah, deceased in 1879, who had been in his lifetime a Karen forester employed in cutting timber in the forests of Upper Burmah, and the owner of elephants used in "ounging" teak timber to the tributaries of the Salwin River to be floated down to Moulmein. The defendant in both suits was Ko Htaw Ah, a Burmese of Moulmein, trading in teak timber. The case alleged was that money having become due to Phatadah, who had sent down timber to Moulmein under contracts with the defendant, payment was refused in 1879; and that Phatadah having died in that year, his elephants and other effects had been unlawfully detained by the defendant through his agent in the forests, Bo Galay.

The first suit, valued at Rs. 2,38,190, was for an account of proceeds of sales of timber alleged to have been sold by the defendant in Moulmein, in which sales Phatadah, who had sent down the timber from the forests, was interested, jointly with the defendant, under two several contracts; the earlier in date of the two having reference to logs cut by Phatadah, and hammer-marked, in the Thoungyeen forest; the later contract having reference to other timber cut by Phatadah, and hammer-marked differently, in another forest, Mai Gnet.

Both these contracts were denied by the defendant, who also denied that he was Phatadah's agent, alleging, on the contrary, that he was his employer, and had largely over-paid him for the work done. He also preferred a counter-claim upon the estate of the deceased to the amount of Rs. 55,360.

The Judge of Moulmein, in the first instance, found that the contracts had been made as alleged, and the timber sent down by Phatadah, who had not been fully paid. He decreed an

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account in the first suit, issuing a commission under s. 394 of the Civil Procedure Code, 1877.

In the second suit, in which the plaintiffs sued Ko Htaw, the same defendant, and Bo Galay his agent, for the detention of property, the Court of first instance found that the defendant had taken possession of thirty-one elephants that had belonged to Phatadah, the other defendant being merely a servant, and disallowed the defence attempted to be made that this had been done either under a contract or in virtue of a custom in the forests. The value of the elephants, found to be Rs. 43,765, and damages for their detention, Rs. 24,800, were decreed payable to the plaintiffs.

The Special Court of British Burmah (JARDINE and WILKINSON, JJ.) reversed the decree in the first, or timber, suit, finding that the contracts were not proved, and that the plaintiffs were not entitled to an account.

In the second, or elephant, suit, the same Court (J. JARDINE and EGERTON ALLEN, JJ.) affirmed the decree of the lower Court. In giving judgment in the second suit, the Court thus disposed of a question as to the over-payment alleged by the defendant in his defence to the first suit :—

"A contention has been raised that the defendants were entitled to set off the amount they claim as balance due to them by Phatadah. Mr. Vertannes argued that s. 111 of the Code of Civil Procedure gave his client that right. But this section narrows the area which the words of Act VIII of 1859, at first sight, appear to allow to cross claims in the same suit; and clearly, and in express words, allows claims to set off ascertained sums of money, and by implication disallows such claims where the sum has not been ascertained. In the present case there has been no ascertainment, in fact the present plaintiffs brought a separate suit to get an account made; and the present claim to set off is on all fours with those held to be inadmissible in the cases collected by Mr. Broughton under s. 111 of his edition of the Code of Civil Procedure, and Illustration D, on which Mr. Vertannes has relied, does not apply; because the set-off stated in the answers of defendants is not the amount of the promissory notes but the balance said to be due after allowing interest on one

side and payments on the other, other payments in the jungles also coming into the account. The amount demanded by defendant not having been ascertained, we cannot treat it as a cross claim in the present case, which is altogether different in its nature to the suit brought by the same plaintiffs against the defendant for the taking of an account and payment of whatever balance might be found due to them."

The first suit having been dismissed and the second decreed, the plaintiffs on the one side, and the defendant on the other, filed these appeals. After their registration, the defendant, in 1885, applied for special leave to file a cross appeal to be heard at the same time.

This application was granted, Mr. *J. T. Woodroffe* appearing for the petitioner, opposed by Mr. *A. Agabeg*. The principal ground was that the defence in the first suit having alleged the debt of Rs. 55,360 from Phatadah's estate, partly on account of advances made to enable Phatadah to purchase elephants and fell timber, partly on account of money paid in protection of a lien on the timber, and partly in regard to promissory notes alleged to have been made by Phatadah to the amount of Rs. 32,565, it had been made a ground of special appeal to the special Court that the lower Court ought to have fixed an issue as to these liabilities. But the appeal having resulted in the dismissal of the first, or timber, suit, the defendant had, in the second, been held liable to pay more than would have been found due from him had the counter-claim, arising out of these transactions, been considered.

On these appeals,—

Mr. *R. V. Doyne* and Mr. *A. Agabeg* appeared for the representatives of Phatadah.

Mr. *A. Phillips* (with whom was Mr. *A. Scoble, Q.C.*) appeared for Ko Htaw Ah.

For the appellants in the first suit it was argued that the evidence had established the making of the two contracts, and the performance of his part under them by Phatadah, who was entitled to an account of the timber sold. For the same parties, as respondents in the second appeal, it was argued that there

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was no ground for interfering with the concurrent decisions of the two Courts in Burmah. And for the same, as respondents in the cross appeal, it was argued that there had been no issue fixed on the question now sought to be raised, which should have been the subject of a suit (if any part of the cross-claim was not barred by limitation); moreover, the evidence had not established it.

Mr. *A. Phillips* for Ko Htaw Ah, as respondent in the first suit, contended that the suit had been rightly dismissed, the contracts not having been proved. He argued for the same party as respondent in the second suit that, even assuming that the detention had been correctly found, the damages had not. For him also, as cross appellant, the contention was that for all the timber which arrived he had credited Phatadah, against whom there would have resulted a debit on the taking of a general account. And this counter-claim, if not covered by the issue as to what the plaintiffs were entitled to claim, might, at all events, be regarded as a set-off within ss. 111 and 116 of the Code of Civil Procedure. The dismissal of the first suit by the special Court would not prevent the defendant from insisting on this set-off. A defendant, denying a plaintiff's claim, might allege also a set-off, and might obtain a decree for it although the plaintiff did not succeed in establishing any sum to be due to him—*Haiyat Khan* v. *Abdulakhan* (1).

Mr. *R. V. Doyne* replied on the whole case.

On a subsequent day (February 16th) their Lordships' judgment was delivered by

LORD MONKSWELL.—These are two appeals from judgments of the Special Court of British Burmah, in both of which the widow and children of one Phatadah were plaintiffs, and Ko Htaw Ah, a Burmese merchant, was defendant; in the second case an agent of his being joined as a co-defendant with him. In the first case, which may be conveniently called the timber case, the Court of Moulmein gave judgment for the plaintiffs. That judgment was reversed by the Special Court of British Burmah, by which judgment was given for the defendant and the suit dismissed. From this judgment the plaintiff appeals,

(1) 6 Bom. H. C. Rep., 151.

and there is a cross appeal by the defendant on the ground that he has a cross claim which makes Phatadah to have been his debtor. In the second case, which may be called the elephant case, both Courts concurred in finding for the plaintiff, and the defendant only appeals.

It will be convenient to deal with the cases separately; but in order to make them intelligible, a short statement is necessary.

On the banks of the Salwin River and its tributaries are extensive forests, partly, it would appear, in the Burmese territory, and partly in the territory of a neighbouring semi-barbarous tribe called the Karens. A large timber trade is carried on in these forests, timber being cut, and as it is called, ounged—that is, dragged or pushed by elephants into the creeks or adjoining rivers and streams, and left to find its way, apparently without assistance, down to Moulmein. Near Moulmein there is a station called Kadoe where the timber is intercepted, chiefly for the purpose of the revenue being collected upon it; and it appears that Burmese merchants, who were in the habit of buying timber from the Karens (the Karens for the most part confining their operations to the forests), or employing the Karens to cut timber for them, and of sending it to float down to Kadoe, used certain marks for its identification, which marks were registered by a Government official at Kadoe. It has not been very distinctly explained what the regulations were under which those marks were registered, but their Lordships collect (what appears to be sufficient for the present purpose) that the existence of the mark of a merchant on timber was sufficient *primâ facie* to constitute some title on his part to it, and also some title of the Government to revenue to be paid by him for it.

The late husband of the plaintiff was a Karen. He seems to have been a leading man among the Karens, to have had some capital and a number of elephants, and before the transaction which forms the subject of this action, to have been in the habit of cutting timber in these forests and of selling it there. He was in no sense a merchant conveying timber from the forests to Moulmein, and he had consequently no registered marks. The defendant is a timber merchant carrying on extensive transactions,

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having considerable capital, and the lessee of one of the forests in which the timber was felled which formed the subject of the action.

The plaint in the suit states the plaintiff's cause of action clearly and succinctly. She says she is the widow of Phatadah, who died in 1879. "That in or about the year 1871 Phatadah entered into an agreement with the defendant, whereby he was to send to Moulmein timber marked" with the "*pin-byit*" mark—which may be shortly described as three circles with crosses within them—"worked and purchased by him in the Thoungyeen forests, and defendant was, as Phatadah's agent, and for and on his behalf, to dispose of the same and render an account of the proceeds of the sales effected by him. That between July 1871 and January 1879 the defendant received and entered at Kadoe 5,226 logs of timber bearing the said mark, which he disposed of. That subsequently, that is to say about six years ago, the said Phatadah agreed with the defendant to work and send timber down from the Mai Gnet forests to Moulmein, which timber was to be marked by him with the mark "Ko Lan," and that the defendant should sell the same for Phatadah as his agent and account for the proceeds of the sales effected by him. That between November 1879 and July 1880 the defendant received and entered at Kadoe 1,183 logs of timber bearing the said mark, and disposed of the same." The plaint then states that the defendant paid Phatadah Rs. 30,000 on account, but that he has rendered no account of the sales. Then the plaint prays for an account of the sales against the defendant.

The defendant, in his written statement, denies having entered into either of the alleged agreements. He says that the "*pin-byit*" mark is his own, but registered by him in his son's name, and that the timber which came from the Thoungyeen forest was his own, purchased by him there out of his own moneys. He further says that, "with regard to the timber marked Ko Lan (which is the defendant's own registered hammer-mark), defendant begs to state that, in the year 1238, Phatadah, who had for several years previously been working on his own account in the Maipain forests, came to him and asked him to assist

him with some money to buy elephants, and to permit him to work in the Mai Gnet forests. That in accordance with his request defendant lent him Rs. 17,555 on the understanding that he should work for defendant in Mai Gnet forests on the following terms:—Phatadah was to cut and oung with his elephants as much timber as he could, and make it over to defendant in the Salwin River, at the rate of Rs. 17 per log for full-sized logs, and Rs. 5 for under-sized logs, defendant paying the revenue due to the Chief of Zimmay on all timber so delivered. Phatadah was, in accordance with the prevailing custom of foresters working in other people's forests, not to remove his elephants from the Mai Gnet forests as long as he was indebted to the defendant." The plea then states that, in accordance with the above arrangement, Phatadah worked in the defendant's forests until his death, during which time he took several further advances from the defendant; and that, at the time of his death, Phatadah was indebted to defendant in the sum of Rs. 40,234, which, with further payments and interest, amounted to a cross-claim of Rs. 55,360 against the estate of Phatadah.

The evidence was extremely conflicting and unsatisfactory. Their Lordships think that no good purpose would be served by going through it in detail, and it will be enough to indicate some of its leading features. The plaintiff, the widow, speaks of the original contract in these terms. After saying that her husband was a head man among the Karens, she says: "I know the defendant; he came to my house at May Too village 12 years ago. He entered into an arrangement with my husband as follows: 'Let us form friendship and drink each other's blood.'" It seems that there is a custom among the Karens, if they make a solemn contract, for each party to drink the blood of the other. "The defendant told the deceased to cut down timber and send it to Moulmein, and he, that is defendant, would sell it. Defendant said,—'friend, this is your mark' (exhibit A., a marked hammer, identified). Defendant produced this and gave it to Phatadah. My husband worked timber after defendant went up for five years at Thoungyeen. He came down to Tsin-yo." Then she says: "After arrival at Tsin-yo I came with my husband

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to Kaw Nhat, where defendant was residing, to ask for the price of the 6,000 logs of timber sent down from Thoungyeen." It is represented by this lady and several of the witnesses that Phatadah sent down as many as 6,000 logs of timber from Thoungyeen. Then she says: "The defendant said 'friend, do not be alarmed about the money; keep it here until you build a substantial house.'" Then she speaks of the second contract about working timber at Mai Gnet. "My husband said he was getting old and could not do it. Defendant said: 'You are acquainted with the Karens, and if you work timber can be obtained.' Phatadah was to send down the timber; defendant was to sell it and pay him. I was present and heard this. My husband was present and went up to the Mai Gnet forests. He never got any money from defendant," and so on. She also says in her evidence that Phatadah was to become security, with the other Karens, for the defendant; and that that was the consideration on which the defendant agreed to act for him. She says, subsequently, in respect of the second contract: "The defendant agreed to sell Phatadah's timber at the second agreement out of gratitude, as he had stood security for him." She calls four coolies, all of whom declare themselves to have been present on this occasion, and to have witnessed the drinking of the blood, and all of whom speak in substance, though somewhat vaguely, of the transaction, namely, that Phatadah was to cut timber and send it down, and that the defendant was to sell it for him in consideration of friendship, and of his having gone security for him with certain Karens. It may be observed that there is no proof in the case of his having "gone security," whatever that expression may mean.

It may be observed here that, according to this lady's evidence, herself and a number of her witnesses were entertained by a person of the name of Ma Bwin, a rich lady, who seems to have maintained the suit, the defendant suggests out of ill-will to him on account of his having obtained possession of a forest which she wanted; and there also seems to have been some written agreement between the widow and her witnesses that, in the event of her succeeding in establishing her case, they were all to receive something.

The coolies also speak of Phatadah having, during five or six years, sent down as many as 1,000 logs a year; so that, on the whole, some 6,000 logs of timber were sent down, according to their account, from the Thoungyeen forest to Kadoe, to be sold for the plaintiff by the defendant. There is also some further evidence to the effect that Phatadah bought some logs of timber, about 500, and that he put, or caused to be put, his "*pin-byit*" marks upon some timber which he sent down; further that he demanded payment of defendant and was put off with excuses. Further, the hammer which is said to have been delivered to him by the defendant is put in, by which it appears that, although the circles remained, the crosses had been, in a great measure, intentionally defaced; that is, in substance, the case of the plaintiff.

The defendant denies the contracts. He admits that he received a large number of logs amounting to 5,000 in round numbers, at Kadoe, some bearing the "*pin-byit*" mark and others bearing the mark of the circles without the crosses, *i.e.*, the "*pin*" mark only, and he accounts for it in this way. He says that he made an agreement in 1870 or 1871 with one Tsit Paw, a Karen (who is dead), to buy of him 3,500 logs, and that he put this circle and cross mark upon all of those. He further says that, upon the conclusion of his transaction with Tsit Paw, he bought a number of other logs, some 1,500, and afterwards some more, from Ko Nan Gay; and that, in order to prevent confusion between his purchases from Tsit Paw and his purchases from Ko Nan Gay, he caused the crosses on all the hammers he had (he appears to have had several) to be obliterated; so that, according to his story, there ought to have arrived from Tsit Paw some 3,500 logs with the "*pin-byit*" mark and Tsit Paw's mark; and there ought to have arrived from Ko Nan Gay, who had no mark of his own, a certain number with the pin mark without the cross. This is what happened. It seems from the record which is kept at Kadoe that 3,318 logs with the "*pin-byit*" mark and Tsit Paw's mark arrived in the course of two or three years, which certainly is confirmatory of the defendant's story, as far as it goes, and 1,607, or somewhere about that number, came with the plain pin mark, together with some

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other marks which, though Ko Nan Gay had no mark of his own, might have been impressed upon them by persons with whom he dealt. This is also confirmatory of defendant's story. He goes on to say that, with respect to the subsequent alleged agreement in 1876, the forest of Mai Gnet was his own, and he puts in his lease. He insists that it is highly improbable that he should have given Phatadah his own timber and consented only to act as agent for him. He says that what he really did was to employ Phatadah to cut and oung timber for him in his own Mai Gnet forest; and that he made him a considerable advance—some Rs. 17,000 odd—for the purpose of enabling him to do all that was necessary for that purpose. It should be said that, with regard to the former alleged contract, having reference to the Thoungyeen forest, he said that he did employ Phatadah to oung four thousand logs at eight annas a log; he further says, with respect to the Mai Gnet forest, that he made subsequent advances, and that he got promissory notes for them. He maintains that Phatadah was largely in his debt.

The first question is whether the plaintiff has proved her case. In the first place, we have to deal with a supposed contract made 12 years before the trial, entirely by word of mouth, and on which the evidence is that of the plaintiff herself and the coolies—evidence of a very loose description, which appears to their Lordships not satisfactory. Further, the contract alleged bears a great deal of improbability on the face of it. Phatadah was a Karen with some, but not a large, capital. Before this transaction, he had confined his dealings to cutting and selling timber in the forests. It does not seem very probable that he should have entered upon transactions of the magnitude alleged, whereby he sent down some 6,000 logs, the price of which would far exceed a lac of rupees. Again it seems improbable that the defendant, a merchant, and a considerable capitalist, should have consented to reverse positions with Phatadah, to make Phatadah the principal and himself the agent, and to agree to account to Phatadah. That becomes still more improbable when we consider that he is alleged to have done this without any commission such as would ordinarily be given on the sale of timber, but simply out of friendship—

signified by the drinking of blood—and a supposed promise to become security which was not proved to have been performed.

It appears therefore to their Lordships, without going more in detail into the evidence, that on the whole the two contracts alleged by the plaintiff—the first as to the Thoungyeen forest, and the second as to the Mai Gnet forest—are not sufficiently proved. They regard the account which the defendant gives of the transactions the more probable; and they may further observe that the production by the plaintiff of the marked hammer, on which a great deal of reliance has been placed, seems to bear against her. The defendant states that he obliterated the crosses, and why he did so; the hammer is shown, and the crosses appear to be obliterated so far that, though traces of them remain, they would not be sufficient to impress the cross mark upon timber. That would indicate that the hammer must have been in the possession of the defendant for some time, and does not accord with the case of the plaintiff that Phatadah continued in possession of it from the time of receiving it. The obliteration of the crosses agrees with the defendant's account, and disagrees with that of the plaintiff, who appears to have had no knowledge of the obliteration, and whose case is that all the timber which was sent down was marked with the full mark of the circles and the crosses, and with no other. On these grounds it appears to their Lordships that the Court of Appeal was right in holding that the plaintiff had not proved her case.

With respect to the cross claim on the part of the defendant, the first question which arises is whether it is admissible under the pleadings. The claim is not for the recovery of money, but for an account, and it is, at all events, doubtful whether a set-off could be pleaded in answer to such a claim. It must further be observed that no issue was framed or even applied for on this question. It appears to their Lordships, therefore, that it is not open to the defendant to raise it. That being so, it is not necessary to go into the question of whether the alleged promissory notes are or are not genuine. Their Lordships, however, cannot help observing that the evidence of the cross claim is highly unsatisfactory.

For these reasons their Lordships will humbly advise Her

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Majesty in this case that the judgment of the Special Court of British Burmah be affirmed, and that both appeals, the plaintiff's appeal and the cross appeal, be dismissed. The appeal will be dismissed with costs; and the cross appeal without costs, save those which were incurred by Nan Karay Phaw in opposing the petition for special leave to enter a cross appeal.

The second suit is a suit by the widow for the purpose of obtaining, as against the defendant, certain elephants of Phatadah which he has detained, or the price of those elephants; and further for damages for the detention and use of those elephants by the defendant for two years. The defendant seeks to justify the detention of the elephants on the double ground, first of a contract with Phatadah, by which he was entitled to detain them, and secondly of a custom of the forest. Both these contentions are negatived by both Courts, and being questions of fact, must be treated as decided. The amount of damages on which a question was raised falls under the same rule. No set-off has been pleaded in this case. The judgment therefore of the Special Court will be affirmed, and the appeal dismissed with costs, and their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellants in the first suit, respondents in the second, and cross-respondents: Messrs. *Bramall & White.*

Solicitors for the respondent in the first suit, appellant in the second, and cross-appellant: Messrs. *Sanderson & Holland.*

C. B.

P. C. *
1886
March 17, 30.

JADULAL MULLICK (DEFENDANT) *v.* GOPALCHANDRA MUKERJI AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Right of way—User of twenty years to support servitude—Extent and mode of user—Calcutta Municipal Act (Bengal Act IV of 1876).

As establishing his right of way over the defendant's passage, the plaintiff relied upon a user of it, several times in the year, for twenty years prior to the defendant's interruption of it, by mehters for the purpose of removing the contents of a cess-pool connected with a privy belonging to the plaintiffs' house.

* *Present*: LORD BLACKBURN, LORD HOBHOUSE and SIR R. COUCH.

The facts indicated by way of limit to the user of the passage only showed that it must be a reasonable user for the above purpose. There was no agreement specifying times, or occasions of access, and the inference was that, if the plaintiffs had thought fit to use the passage more frequently than they did, they were at liberty to do so.

In and after 1876, instead of the plaintiffs' mehters, those employed by the Municipality came and went upon the passage, not at distant intervals, but daily, the plaintiffs under bye-laws, in conformity with Bengal Act IV of 1876, being bound to give them access, and the system being to clean the place daily.

Held, that the above was neither a discontinuance by the plaintiffs of their user, nor an aggravation of the servitude. Also, that, although a servitude gained for one purpose cannot be used for another, the purposes before and after 1876 being identical, the user proved prior to that year supported a right in the plaintiffs to use the passage for giving access to the servants of the Municipality, for the above purpose, at reasonable and convenient times.

APPEAL from a decree (27th January 1883) of the High Court (1) reversing a decree (14th March 1882) made in its Ordinary Original Jurisdiction.

The decree, from which this appeal was preferred, declared that the plaintiffs, who now were the respondents, as owners of the house No. 66, Pathuria Ghât Street in Calcutta, were entitled to use a passage belonging to the defendant, now appellant, for the purpose of having a privy of the said house cleaned out by mehters at all proper and convenient times, and an injunction was awarded restraining the defendant from interfering to prevent such user.

The parties to the suit were owners of adjoining houses. The plaintiffs claimed a right of way along a passage belonging to the defendant, and the defence was that the right claimed had not been established by open and continuous user for the period of prescription. The purpose of the right claimed was to give access to mehters to empty the cess-pool of the plaintiffs' privy. It was not disputed, however, that, after the enactment of Bengal Act IV of 1876 (The Calcutta Municipal Act, 1876), the mehters employed by the Municipal authorities of Calcutta alone used the passage for the above purpose. This they did much more frequently than the plaintiffs' mehters had done; in fact daily

(1) I. L. R., 9 Calc., 779.

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instead of several times in the year, the new system requiring that the cleaning out should take place daily.

The Court of Original Jurisdiction (WILSON, J.) found that the plaintiffs had not shown that they had exercised for twenty years the right now claimed. The suit was, therefore, dismissed.

On appeal the High Court (GARTH, C.J., and CUNNINGHAM, J.) found, on the contrary, that there was sufficient evidence of the plaintiffs having used the passage, for the purpose alleged, for twenty years before the interruption by the defendant. As to the extent of the user, the Court held that the plaintiffs had been entitled to the use of the passage for the above purpose, as might be required; and the purpose for which the right was now claimed was identical with the original purpose of the user. The only alteration was that the right was now more frequently exercised than formerly. A degree accordingly was made in favor of the plaintiff.

The judgments of the Appellate Court are reported in I. L. R., 9 Calc., 779.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *A. Phillips* appeared for the appellant.

Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne* for the respondents.

For the appellant it was argued that a continuous user of the passage in dispute had not been established. Even if a right of occasional user of the passage, for the limited purpose described, had existed in the plaintiffs before the new drainage system of the Calcutta Municipality had come into operation, the change in 1876 was such that a discontinuance of the user had taken place, extinguishing the formerly existing right. The evidence shewed that, under what might be called the cess-pit system, there had been a user of the passage, for the purpose described, a few times in the year. This could not be, for the purpose of carrying out another system, enlarged into a daily user. The right now claimed was not identical with the formerly subsisting one; and could not be so treated without aggravation of the obligation upon the owner of the servient tenement. The right of way

now claimed whether it might, or might not, rest upon the provisions of Bengal Act IV of 1876, could not rest upon the original user.

Reference was made to *Wimbledon and Putney Commons' Conservators* v. *Dixon* (1); Bengal Act IV of 1876, ss. 235, 238 and 340.

For the respondents, Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne* contended that the user had been established as the Appellate Court had found. The altered mode of user had not operated as a discontinuance, and there had been no aggravation of the servitude. The extent of the user was a mode, no doubt, whereby the extent of the right was indicated; but the purpose for which the right was exercised was the main point for consideration. As to this, the evidence showed that the user, since the alteration of the system, had not been extended beyond the identical purpose for which the original servitude had all along existed.

It could not be considered possible that all easements of this class in the Town of Calcutta were destroyed by the legislation of 1876 having compelled an increased number of clearings. Reference was made to *Daud* v. *Kingscote* (2) as showing that, even under a grant, a right was not necessarily confined to such modes of exercise as were in use at the time of the grant—Goddard on Easements, Chapter III, s. 2; *The Corporation of London* v. *Riggs* (3).

Mr. *R. V. Doyne* replied.

On a subsequent day (March 30th) their Lordships' judgment was delivered by

LORD HOBHOUSE.—The plaintiffs below who are the respondents here, and the defendant who is the appellant, occupy contiguous houses and premises in Calcutta, with a southern frontage in Pathuria Ghât Street. The plaintiffs' house lies to the eastward of the defendant's. Adjoining the north side of the defendant's premises lies a piece of ground also belonging to him, and fronting northwards to a street called apparently by various names, of which Jorabagan is one. At a point between the two streets the defendant's property juts out a few feet to the

(1) L. R., 1 Ch. D., 362. (2) 6 M. & W., 177.
(3) L. R. 13 Ch. Div., 798.

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eastward, and to that extent overlaps the property of the plaintiffs, and lies to the north of it.

The following facts are common to the case of both parties: that an open drain used to run along the eastward boundary of the defendant's property from the point where it juts eastward into Jorabagan; that at the same point there communicated with this drain one of the drains of the plaintiffs' house leading directly from one of their privies; that at the point of communication there was a doorway in the plaintiffs' wall; and that in the year 1876 the drain was filled up, and has never again been opened.

The plaintiffs brought evidence to show further that their house was constructed with a double wall so as to form a narrow passage from the privy to the doorway; that periodically, some three or four times a year, scavengers hired by the plaintiffs, or their predecessors, entered the drain at Jorabagan and made their way up it to the doorway; that the doorway was furnished with a door which was kept locked, but was opened by the plaintiffs' durwan on these occasions; that the scavengers came through the doorway, passed along the plaintiffs' drain between the double walls, and so reached the privy, from which they carried the refuse away through the doorway and down the defendant's drain into Jorabagan. Certainly one of the witnesses, and probably another, deposes to the continuance of this practice from dates more than 20 years prior to the defendant's interruption of it, which was in December 1880. The suit was instituted in June 1881.

Against this evidence the defendant has produced nothing at all except that he never saw the plaintiffs' scavengers at work, and that he and Mr. Edwards, a surveyor, say that it was impossible for the scavengers to go where several witnesses saw them go. And, in cross-examination, the defendant admitted that the doorway could only lead to the drain.

Indeed in this part of the case the defendant appears to have relied mainly upon imperfections in the plaintiffs' evidence. Mr. Justice Wilson, who presided in the Original Court, thought that the plaintiffs had failed to show user for 20 years. But it is observable that he says there is only one witness, *viz.*, Tarrabullub Chatterjee, who professes to carry his memory back to 20 years at all. He does not notice Dwarka Nath Bonnerjee, who had

known the privy and drain for upwards of 25 years, and who speaks of the action of the plaintiffs' scavengers, apparently, for the note of the evidence is not perfectly clear, for that space of time. Neither does he notice the probability afforded to the plaintiffs' story by the construction of their walls and of their doorway, both of which date more than 20 years before the interruption.

Mr. Justice Wilson dismissed the suit. On appeal the High Court took a different view, and gave the plaintiffs a decree establishing their right to use the passage in dispute for the purpose of carrying away their night-soil at all proper and convenient times in the year. Their Lordships concur in the view which the Appellate Court has taken of the evidence, and think that the user on which the plaintiffs rely is sufficient unless it has been interrupted or altered in character by the events which took place in and after the year 1876.

In that year the Legislature of Bengal passed an Act for the more efficient Municipal Government of Calcutta. Under the powers conferred by that Act, the Town Commissioners made bye-laws to regulate the removal of refuse. It is not to be discharged in any other way than as the Commissioners direct. The servants of the Municipality are to cleanse daily the privies of every house, on account of which a night-soil fee is levied, and for that purpose every occupier of a house is to give free access to his privy. An occupier of land on which a privy is situated, and to which such free access is denied, is not to allow night-soil or filth of any kind to accumulate for more than twenty-four hours. Under these regulations the open drain bordering the defendant's land was, as before stated, filled up, and the surface has been used by the scavengers of the Municipality ever since to gain access to the privy of the plaintiffs', for the purpose of removing the refuse. This they do daily.

Mr. Doyne has argued for the defendant that the change of system thus brought about operates as a breach of the user by the plaintiffs, and so destroys their title by prescription. But their Lordships cannot see that the change of system works any discontinuance of the prior user. In point of frequency, the user is much more active than before. The purpose is still

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the purpose of cleansing the privy. The mode of access from Jorabagan to the privy is not altered, except that the scavengers, instead of walking in the drain, walk on the surface of the earth that fills it. And it cannot make any difference that the plaintiffs no longer use the passage to admit their own scavengers, but use it to admit those of the Municipality, to whom they are bound to afford free access.

It is then argued that the change from the practice of cleansing at long intervals to the practice of cleansing daily is so great that the servitude gained by user is materially aggravated, indeed that it is applied to a new purpose, which the plaintiffs have no legal right to do.

But it is difficult to see how the servitude is aggravated, even in the sense of causing more annoyance to the defendant. In order to afford the requisite access only three or four times a year, the passage must be kept open and unobstructed. That being so, it cannot be much more onerous to the defendant that a small quantity of refuse should be removed daily than that a large quantity should accumulate and be removed at long intervals of time.

The real question, which is not free from difficulty, is whether the user proved prior to 1876 is one which sustains the right affirmed by the decree under appeal. A servitude gained for one purpose cannot lawfully be used for another. What then is the servitude which the plaintiffs have acquired over the defendant's land? There is no agreement specifying times or occasions of access. The defendant has never till now interfered with the access, or claimed to exercise any control over it. The servants of the plaintiffs came and went at their own discretion, or at the discretion of their employers. What is the inference to be drawn? It is difficult to suppose that if they thought fit to use the passage twice as often, or four times as often, as they actually did use it, they were not at liberty to do so. There is nothing in the proved facts to indicate a limit to the user of the passage, except the limit that it must be a reasonable user for the purpose of cleansing. It seems to their Lordships that if, without any action on the part of the Municipality, the plaintiff had chosen to cleanse out their privy every morning, they might have used the

passage at a convenient hour for that purpose. If so, they may now use it for giving access to the servants of the Municipality at reasonable and convenient times. And in a legal sense they are not aggravating the servitude at all, for this is the servitude to be inferred from the proved facts.

The result is that, in their Lordships' opinion, the decree appealed from is right, and this appeal should be dismissed. They will humbly advise Her Majesty to that effect. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Sanderson & Holland.*

Solicitors for the respondents: Messrs. *Wrentmore & Swinhoe.*

C. B.

CIVIL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Norris.

SHERE ALI AND ANOTHER (PLAINTIFFS) *v.* C. L. PRENDERGAST AND ANOTHER (DEFENDANTS.) *

1886 *March* 5.

Army Act (44 and 45 Vict., c. 58), s. 148—Courts of Requests, their jurisdiction—Court of Small Causes, Power of—Construction of s. 151, cl. 1, of the Army Act.

The Army Act (44 and 45 Vict., c. 58) gives jurisdiction to a Court of Small Causes in all actions of debt and personal actions against persons subject to military law (other than soldiers in the regular forces) over which such Court would ordinarily exercise jurisdiction, and provides a Court of Requests (s. 148) for those cases only where an action of the value of Rs. 400 or under has to be brought against such persons at a place lying beyond the jurisdiction of any Small Cause Court.

Held, also, that the words "within the jurisdiction" in s. 151, cl. 1, referred to "actions" and not to "persons."

THIS was a reference from the Court of Small Causes at Patna under s. 617 of the Civil Procedure Code. Sheik Shere Ali and another brought a suit in the Court of Small Causes at Patna against Major C. L. Prendergast, Deputy Judge Advocate General, residing in Rawalpindi, and Shiva Gobind living at Dinapur, within

* Civil Reference No. IA of 1886, made by Baboo Troilokya Nath Mitter, Judge of the Small Cause Court, Patna, dated the 15th December 1885.

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the local limits of the Patna Small Cause Court, for recovery of the value of goods sold and delivered at Dinapur, and on August 13th, 1883, obtained an *ex parte* decree. In execution of the decree, an order having been issued on the Military Paymaster of the Punjab Circle for the attachmemt of Major Prendergast's salary, an objection was taken to the effect that the proper Court which could take cognizance of the case was a Court of Requests composed of officers under s. 148 of the Army Act (44 and 45 Vict., c. 58) and not the Patna Court of Small Causes.

The Judge was of opinion that, in s. 151, cl. 1, "in India all actions of debt and personal actions against persons subject to military law other than soldiers of the regular forces, within the jurisdiction of any Court of Small Causes shall be cognizable by such Court to the extent of its powers," the words "within the jurisdiction" referred to "actions" and not to "persons," and that, under the section, actions of debt and personal actions against military men over which any Small Cause Court would ordinarily exercise jurisdiction should be cognizable by such Court to the extent of its power; and when such an action of the value of Rs. 400 and under had to be brought against a military man (other than soldiers of the regular forces) at a place lying beyond the jurisdiction of any Small Cause Court, then and then only it should be triable by a Court of Requests."

The following question was referred to the High Court: Whether, under the circumstances, the Patna Court had jurisdiction to try the suit.

The opinion of the Court (MITTER and NORRIS, JJ.) was as follows:—

We are of opinion that the view taken by the Judge of the Small Cause Court, Patna, of s. 151 of the Army Act (44 and 45 Vict., c. 58) is correct; and we are of opinion that Major Prendergast's pay may properly be attached in execution of the decree obtained against him.

K. M. C.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

GRISH CHANDRA (ONE OF THE DEFENDANTS) *v.* KASHISAURI DEBI (PLAINTIFF) and BROJO SUNDARI DEBI (PROFORMA DEFENDANT).*

1886 *April* 15.

Transfer of Property Act (IV of 1882), s. 135—Transferee of a claim for smaller value—Recovery of full amount of debt.

It is not the object of s. 135 of the Transfer of Property Act absolutely to prevent a transferee, who has purchased a claim at a smaller value, from recovering the full amount of the debt due from the debtor.

BROJO SUNDARI DABI claimed the sum of Rs. 540 as her maintenance allowance under the terms of a registered *ekrar* executed in her favour by her step-son, Grish Chandra Moitra. She sold her claim to Kashisauri Debi for a consideration of Rs. 344. The transferee brought a suit against Grish Chandra for the recovery of the full amount of Rs. 540 as principal and Rs. 110 as interest. The defendant in his written statement denied the title of the purchaser and pleaded payment to Brojo Sundari.

The Munsiff dismissed the suit on the ground of a flaw in the deed of sale. The District Court decreed the claim. On appeal to the High Court, it was contended that the plaintiff was not entitled to recover anything beyond the amount for which she purchased the claim.

Baboo *Lal Mohun Das* for the appellant.

Baboo *Ishwar Chunder Chuckerbutty* for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows :—

MITTER, J.—The only point which we think it necessary to notice is that raised in the third ground of the petition of appeal, *viz.*, "that the plaintiff is not entitled to recover anything beyond the amount for which she purchased the claim."

*Appeal from Appellate Decree No. 2338 of 1885 against the decree of G. G. Dey, Esq., Judge of Pubna and Bogra, dated the 10th of July 1885, reversing the decree of Baboo Bepin Beharee Mukherji, Munsiff of Pubna, dated the 16th of February 1885.

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The plaintiff is the transferee of a debt due to one Brojo Sundari Debi from the appellant before us. The claim is to recover Rs. 650, made up of Rs. 540 principal and Rs. 110 interest. This actionable claim was admittedly purchased by the plaintiff for Rs. 344; and it is contended before us for the first time in second appeal that, under s. 135 of the Transfer of Property Act, which applies to the transaction under which the plaintiff became entitled to this actionable claim, the plaintiff is only entitled to recover the price which she paid, and the incidental expenses of the sale, although the third ground does not admit that she is entitled to those expenses.

We are of opinion that this contention is not valid. Section 135 does not say that a transferee is *not entitled* to recover from the debtor the full amount of the debt due from the latter. It simply says that the *debtor would be wholly discharged by paying* to the buyer the price and the incidental expenses of the sale with interest on the price from the date the buyer paid it. In this case the debtor did not pay to the plaintiff the amount mentioned in the section, nor is it alleged that he offered to pay that amount, and that the plaintiff refused to accept it. The section, therefore, is not applicable to the present case. Clause (*d*) of that section also points out that, even if the debtor had offered to pay the amount mentioned in the section after the decree in the lower Court, he would not have been discharged, because that clause says that the former part of the section will not apply where the judgment of a competent Court has been delivered confirming the claim. We are, therefore, of opinion that this objection is not valid.

We dismiss the appeal with costs.

K. M. C.

Appeal dismissed.

Before Mr. Justice McDonell and Mr. Justice Beverley.

LOKE NATH SURMA AND OTHERS (PLAINTIFFS) *v.* KESHAB RAM DOSS AND OTHERS (DEFENDANTS).*

1886 *April* 19.

Multifariousness—Misjoinder of causes of action—Civil Procedure Code, 1882, *s.* 28—*Suit for declaratory decree—Specific Relief Act* (*I of* 1877), *s.* 42.

The plaintiffs having obtained a decree for the possession of certain lands and having received formal possession thereof, brought a suit against 86 persons holding distinct and separate tenures in those lands, on the allegations that, "on the plaintiffs attempting to measure the lands, and calling on the tenants to pay rent, ten of the defendants described as *prodhans* or headmen formed a combination and gained over the other defendants with a view to injure the plaintiffs; that through their help and endeavour the remaining defendants failed to recognize the plaintiffs as landlords, and declined to pay any rent or to allow them to measure the lands, driving away an Amin who went to measure the lands on behalf of the plaintiffs, and thereby preventing the plaintiffs from exercising their proprietary rights; that the plaintiffs brought suits for rent against some of the defendants, and in those suits the defendants denied the plaintiffs' title as landlords, whereupon the plaintiffs seeing the necessity of instituting a suit for declaring the defendants tenants of the land withdrew the suits for rent." They stated their cause of action to "be the defendants' act of not recognizing us as their landlord and thereby preventing us exercising our proprietary rights in respect of the land in suit, and not allowing us to make a measurement of that land, and also withholding the payment of rent"; and prayed for a decree establishing their proprietary right and declaring the defendants to be their tenants. *Held*, that there was but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property they had purchased; and that the suit was not multifarious within s. 28 of the Civil Procedure Code. *Held*, also, that the declaratory decree prayed for could be made notwithstanding the plaintiffs might have asked for possession of the lands.

THE judgment appealed from in which the facts are fully stated was as follows:—

"The plaintiffs are the proprietors of two taluks—No. 5, Mahomed Nazim and No. 6, Mahomed Aufar. In the year 1877 they brought a suit against one Nasrat Raja, proprietor of taluk No. 3, for the recovery of certain lands claimed as appertaining

* Appeal from Appellate Decree No. 807 of 1885, against the decree of J. Kelleher, Esq., Judge of Sylhet, dated the 9th February 1885, reversing the decree of Babo Ram Kumar Pal, Rai Bahadur, Subordinate Judge of that District, dated the 4th of July 1884.

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to taluks Nos. 5 and 6, and alleged to be held by the defendant. That suit was decreed by the Subordinate Judge on the 21st June 1877, and it is said formal possession was delivered to the plaintiffs in execution by a Civil Court Amin deputed for the purpose. The plaintiffs now, specifying the boundaries of certain lands aggregating a total area of 65 hals 10 kears, bring the present suit against the tenants of those lands, 86 in number, on the following allegations:—

"(1.) That the lands in the possession of the defendants were included in those delivered in execution of the decree against Nasrat Raja; that defendants or their predecessors were at that time in possession as the tenants of Nasrat Raja, and were all aware of the proceedings in execution of the plaintiffs' decree.

"(2.) That in Pous 1285 B.S., December (1878), plaintiffs attempted to measure the lands in suit, and called on the jotedars (tenants) to pay the rents of those lands; but ten of the defendants, who are described as *prodhans* or headmen, formed a combination, and gained over the other defendants with a view to injure the plaintiffs; and then through their help and endeavour the remaining defendants failed to recognise plaintiffs as their landlords, and declined to pay any rent or to allow the plaintiffs to make the measurement. It is further alleged that they drove away an Amin who went to measure on behalf of the plaintiffs, and thereby prevented plaintiffs from exercising proprietary rights in respect of the lands and suspended plaintiffs' possession.

"(3.) The plaint then proceeds to state that plaintiffs brought several rent suits against the defendants or some of them in the Munsiff's Court; but that in those suits the defendants denied plaintiffs' right by raising the question of title. Whereupon plaintiffs, seeing the necessity of instituting a civil suit for declaring the defendants' tenants of the land, withdrew the rent suits mentioned.

"In paragraph 5 of the plaint the cause of action is stated as follows: "The defendants' act of not recognising us as their landlords, and thereby preventing us to exercise our proprietary right in respect of the land in suit, and not allowing us to make a measurement of that land and also withholding the payment of rent."

"The plaintiffs, therefore, 'pray for a decree establishing the proprietary right of the plaintiffs in respect of 65 hals 10 kears 1 powa of land being under the jote and possession of the defendants, and declaring the defendants as tenants under the plaintiffs, so that the plaintiffs may be enabled to exercise all sorts of proprietary rights in respect of the said property against the defendants,' or for such other relief as the Court should think fit.

"Five of the defendants appeared and objected to the suit on the grounds (1) that it was untenable under the provisions of Act I of 1877; (2) that it was barred by limitation; (3) that it was bad because different causes of action against different defendants separately were joined in a single suit; and (4) that it was bad for non-joinder of parties, because certain persons, alleged to be the actual landlords and in possession and receipt of rent from the defendants, were not made parties. Into the other defences set up it is unnecessary to go more into detail. Defendants denied that the lands held by them were ever included in the suit between plaintiffs and Nasrat Raja, or that they (the defendants) ever paid any rent to Nasrat Raja. They allege that the lands in their tenancy really appertained to taluk No. 2, Korban Raja, that they were themselves owners to the extent of 10 annas, having purchased an 8-anna share from one Ammal Khair Bibi, and a 2-anna share from one Kala Chand Roy; that as regards the remaining 6-annas, they were tenants and paid their rents to the proprietors, who ought to have been joined as parties to the suit.

"At the trial before the Subordinate Judge, a copy of the decree in plaintiffs' case against Nasrat Raja was admitted in evidence against the defendants. Four of the witnesses examined for Nasrat Raja in that suit happened to be included amongst the defendants in the present suit, but they did not appear. However, copies of their depositions in Nasrat Raja's suit were admitted in this suit as evidence, not only against the four defendants themselves, but against the remaining 82 defendants on the record, and his judgment was in a great measure influenced by the former decree and the admissions contained in those depositions. I may here note that the tenancies of the 86 defendants are altogether distinct and separate. It will be observed that, in deciding the sixth issue, the Subordinate Judge relied mainly

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on the admissions contained in the depositions above-mentioned. "Those persons," he adds, "have not been bold enough to make a reply in the present suit, inasmuch as they bound themselves by giving their depositions in the previous suit; but it has been proved by the evidence adduced in this suit that they are in a combination with the defendants who appeared in this suit, and the circumstances of the suit also go to support that," and so of course any admissions made by the witnesses as to their own tenancies became at once evidence with respect to the remaining 82 tenancies. Again in his decision on the seventh issue, the Subordinate Judge refers to those documents and to the admissions contained in the depositions of the four persons examined as witnesses in Nasrat Raja's case.

"In the result the suit was decreed in favour of the plaintiffs, and it was ordered that "the plaintiffs' title to, and possession of, the land in suit be established, and it be declared that the defendants are the plaintiffs' jotedars in respect of that land," and the defendants who appeared were ordered to pay the plaintiffs' costs.

"The objections taken in appeal are substantially the same which were urged before the lower Court. It is contended that the suit is one for which no sanction is to be found in the Procedure Code, and that it is expressly excluded by the provisions of s. 28; that the plaintiffs being able to seek further relief than a mere declaration of title, and having omitted so to do, cannot have a declaration under s. 42 of the Specific Relief Act; that the suit was bad for nonjoinder of the proprietors of the 6-anna share; that it was barred by limitation; that the decree in Nasrat Raja's case and the depositions of the witnesses already mentioned were not admissible in evidence at the trial of this suit, and that in no way could the admissions in those depositions be made evidence against the other defendants to the suit. It was also contended that, if plaintiffs were resisted in their measurement, they had a special remedy provided for them by s. 38, Beng. Act VIII of 1869.

"On the merits of the question of title, the case was argued at length with reference to maps and boundaries and the oral evidence bearing on those points.

"Under s. 28 of the Procedure Code, only those persons may be joined as defendants against whom the right to any relief is alleged to exist "in respect of the same matter." In the course of the argument I asked plaintiffs' pleader how the relief against the several defendants could be said to exist in respect of the same matter, and his reply was: "When I sent my own men to measure the lands, they resisted and denied my right to measure and thereby my proprietary right." When the plaintiffs are driven to resort to a mere fiction of that sort as a ground of jurisdiction, their case must be very weak. The plain facts are that there are 86 tenants of distinct and separate lands who refuse to pay rent to the plaintiffs, have never paid them any, and deny their title to recover any such rents. The case of each particular defendant is entirely distinct and separate in its subject-matter from that of the other defendants. The provisions of the Procedure Code bearing on this question will be found dicussed in a Full Bench decision of the Allahabad High Court—*Narsing Das* v. *Mangal Dabi* (1), and it is unnecessary for me to say more on the subject. I hold that this suit ought to have been dismissed, because different causes of action against different defendants separately were joined, for which procedure no sanction is to be found in the Code.

"Even if that objection were not fatal to the suit, I should be prepared to hold that a declaration of the nature prayed for, without further relief sought, could not be made under s. 42 of the Specific Relief Act.

"In the above view of the case it is unnecessary to go into the other questions raised by the appeals. It is to the advantage of the parties themselves that the questions at issue between them should be left for decision on legal evidence in suits properly framed for the purpose.

"The decree of the lower Court will accordingly be reversed with costs of both Courts and interest at 6 per cent. per annum."

From this decision the plaintiffs' appealed.

Mr. *Woodroffe* and Baboo *Joygobind Shome* for the appellants.

Munshi *Serajul Islam* for the respondents.

(1) I. L. R., 5 All., 163.

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The judgment of the Court (McDONELL and BEVERLEY, JJ.) was as follows :—

The circumstances of this case are fully set out in the decision of the lower Appellate Court.

It is contended in second appeal that the District Judge is wrong in law: (1) in dismissing the suit on the ground that different causes of action against different defendants separately have been joined together; and (2) in holding that a suit for a mere declaration of title without further relief is not maintainable under s. 42 of the Specific Relief Act.

In deciding the first point, the Judge has relied upon the Full Bench decision of the Allahabad High Court in the case of *Narsing Das* v. *Mangal Dabi* (1), in which it was held that, where several distinct causes of action are alleged against distinct acts of defendants who are not jointly liable in respect of each and all of such causes of action, a suit against all the defendants jointly is bad in law.

In the present case, however, it is contended that the cause of action alleged against all the defendants is one and the same, *viz.*, a conspiracy on the part of all the defendants to keep the plaintiffs out of possession of their property; and we have been referred to the case of *Gajadhur Pershad Narain Singh* v. *Saheb Roy* (2), where a number of ryots were held to have been properly sued in one and the same suit, on the allegation that they had fraudulently used a forged *jamabandi* paper with the view to support certain *mokurari* claims which they put forward, and thereby to oust the plaintiff from the full enjoyment of his proprietary right.

In the present case, the cause of action is said to have accrued in consequence of the defendants not admitting the plaintiffs to be their landlords, not allowing them to exercise their *maliki* rights to the disputed lands, not paying them the rents, and not allowing them to measure the lands (see para. 5 of the plaint). And this cause of action is said to have arisen on the dates on which the written statements were filed in the rent suits which the plaintiffs brought against some of the defendants.

(1) I. L. R., 5 All., 163. (2) 19 W. R., 203.

The allegation in the plaint is that some of the defendants *and the predecessors of others* combined to prevent the plaintiffs from measuring the lands, and further that some of the defendants, who were sued for rent, put in answers denying the plaintiffs' title.

These statements are somewhat vague, and do at first sight give rise to the impression that several distinct causes of action against different sets of defendants are being joined in one and the same suit; but on the whole of the pleadings, we think it must be taken that there was really but one and the same cause of action against all the defendants, *viz.*, a combination to keep the plaintiffs out of the enjoyment of the property which they had purchased.

Only 5 out of the 86 defendants appeared, and their defence was that they had a *maliki* right to a 10-anna share of the lands in suit. This defence was apparently put forward on behalf of the other defendants as well as themselves, though it was at the same time alleged that some of the defendants were acting in collusion with the plaintiffs. The District Judge says:—

"The plain facts are that there are 86 tenants of distinct and separate lands who refuse to pay rent to the plaintiffs, have never paid them any, and deny their title to recover any such rents." But the mere fact that these tenants hold distinct and separate lands affords no sufficient reason why they should not be joined as co-defendants in the same suit, if, as the Judge finds as a fact, they have combined to keep the plaintiffs out of possession.

Section 28 of the Code allows all persons to be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or, in the alternative, in respect of the same matter. In the present suit, it is alleged that the right to a declaration of the plaintiffs' title exists against *all* the defendants, inasmuch as they all deny the plaintiffs' right to receive the rents of the land in dispute.

The section in question goes on to say that "judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities without any amendment" of the plaint. And s. 31 of the Code provides

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that "no suit shall be defeated by reason of the misjoinder of parties," but that "the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

By s. 45 a plaintiff is allowed, subject to certain conditions, to join several causes of action against the same defendant, or the same defendants jointly; and if it appears that such causes of action cannot conveniently be tried together, the Court is not to dismiss the entire suit but to order separate trials thereof, or make such other order as may be necessary or expedient for their separate disposal.

We think then that, under the circumstances of the case, this suit ought not to have been dismissed on the ground of misjoinder. In this view we are supported by the decision in *Omur Ali* v. *Weylayet Ali* (1).

Nor in our opinion was the suit liable to be dismissed on the ground that the declaration prayed for could not be made under s. 42 of the Specific Relief Act.

It is contended that the plaintiffs, being out of possession, should have sued to recover possession, and not merely have sued for a declaration of their title. We think that this was unnecessary. The plaintiffs were not seeking for khas possession, but merely for possession by receipt of rent from the defendants. Under these circumstances, even if the plaintiffs had sued for and obtained a decree for possession of the property, that possession could only have been delivered by notifying the declaration of the plaintiffs' title as prayed for. We think, therefore, that the omission to sue for possession was immaterial, and that the suit was not liable to be dismissed on this ground.

Under these circumstances we reverse the decree of the lower Appellate Court and remand the case to that Court under s. 562 of the Code for trial of the appeal on its merits.

J. V. W. *Appeal allowed and case remanded.*

(1) 4 C. L. R., 455.

Before Mr. Justice Porter and Mr. Justice Agnew.

TORAB ALI KHAN AND OTHERS (TWO OF THE DEFENDANTS) *v.* NILRUTTUN LAL AND OTHERS (PLAINTIFFS.)*

1886 *May* 15.

Limitation Act (XV of 1877*), Sch. II, Arts.* 61, 115, 120—*Money which plaintiff was obliged to pay in consequence of acts of defendants.*

On the 29th May 1873 one *T.* drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person his heirs sued the shroff to recover the sum deposited, and on the 30th January 1878 obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February 1884 the shroff sued *T*, the heirs of the third party and another person (who owned to having received some of the money from *T*), to recover the sum he had been compelled to pay under the decree of 1878.

Held, that the plaintiff's cause of action arose at the time when he actually paid down the money on the 15th January 1883, and that the suit therefore was not barred by limitation.

ON the 26th January 1871 one Torab Ali Khan deposited a sum of Rs. 1,329 with the firm of Nilruttun and Co. to the credit of the account of one Asgar Hossain, receiving from the firm a receipt for that sum. On the 20th July 1871 one Chuni Lal (a servant of one Mussamut Bhikhan, an aunt of Asgar Hossain) presented the receipt to the firm of Nilruttun and Co. and received payment of Rs. 200, which payment was endorsed upon the receipt, and was also entered in the books of the firm. Subsequently further payments were made personally to Chuni Lal on production of the receipt, and on the 29th May 1873 Torab Ali Khan himself produced the receipt to the firm and drew out the balance of the money, with the interest-due thereon, and returned the receipt.

Subsequently to the death of Asgar Hossein, his widow, sons and daughters brought a suit against the firm of Nilruttun and Co. to recover the sum deposited in the name of their father; and on the 31st January 1878 obtained in such suit a decree.

* Appeal from Order No. 327 of 1885, against the order of T. Smith, Esq., Judge of Gya, dated the 7th of September 1885, reversing the decree of Baboo Dinesh Chunder Roy, Subordinate Judge of that district, dated the 20th November 1884.

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On execution of this decree issuing, some of the judgment-creditors, *viz.*, the widow and sons of Asgar Hossein, voluntarily gave up their portions of the sum ordered to be paid under the decree, but as regarded the share in the decree belonging to the daughters (who were minors) execution was taken out and the sum due was deposited in Court by Nilruttun and Co. on the 15th January 1883.

Nilruttun and Co. then demanded from Torab Ali Khan the sum which he had received from them, and he admitted that he had made it over to Mussamut Bhikhan, who also refused to repay the amount she had received. Thereupon Nilruttun and Co., on the 5th February 1884, brought a suit against Torab Ali Khan, Mussamut Bhikhan and the minor daughters of Asgar Hossein, the minors being represented by their elder brother as guardian, to recover the sum paid by him on their account, dating their cause of action from the 15th January 1883.

Torab Ali pleaded limitation, and contended that, inasmuch as he was not a party to the suit in which the decree of the 30th January 1878 was obtained, he could not be made liable in this suit.

Mussamut Bhikhan pleaded limitation, and contended that she was not a necessary party to the suit.

The minors put in no written statement.

The Subordinate Judge found that, when Torab Ali received the money, he impliedly, if not expressly, promised the plaintiffs to pay the money to the persons entitled thereto without delay; and that inasmuch as he had not done so, he as well as the persons to whom he paid the money had acted fraudulently towards the plaintiffs, and that the plaintiffs' cause of action against them arose as soon as the fraud was discovered, which was, when the decree in the first suit was obtained, *viz.*, the 30th January 1878, he, therefore, held that the suit was barred by Art. 115 of the Limitation Act, even allowing that the plaintiffs were entitled under Art. 95 to extend the period of limitation so as to allow time to run from the time that the fraud became known to the plaintiffs.

The plaintiffs appealed to the District Judge, who held that the breach of the contract by Torab Ali was a continuing

breach, and that, therefore, on the authority of *Imdad Ali* v. *Nijabat Ali* (1) the suit was not barred.

The defendants appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Moulvi *Mohamed Yusuf* for the appellants contended that there being no contract, the suit did not fall under Art. 115 of the Limitation Act; but that it would either fall under Art. 96 or 120; and relied upon the case of *Raghumoni Audhikary* v. *Nilmoni Singh Deo* (2)

Mr. *W. M. Das* and Baboo *Rash Behari Ghose* for the respondents were not called upon.

The judgment of the Court (PORTER and AGNEW, JJ.) was as follows:—

The plaintiffs' case is that, on the 26th of January 1871, the defendant Torab Ali opened a banking account with their firm in the name of one Asgar Hossein; that on the 29th of May 1873, Torab Ali drew out the amount of the balance at the credit of Asgar Ali, and made it over to the defendant Mussamut Bhikhan; and that, on the 30th of January 1878, a decree was made against the plaintiffs for the refund of this amount at the suit of the heirs of Asgar Hossein. The plaintiffs further state that some of the heirs executed a release to them for the amount of their shares, and that they were obliged to pay the sum of Rs. 930-0-6 to the other heirs on the 15th of January 1883. They now sue for this sum and for Rs. 125-15-6 for interest. The suit was instituted on the 5th of February 1884, the plaintiffs alleging that their cause of action accrued on the day when they had to pay the sum of Rs. 930-0-6. The first Court held that the suit was governed by Art. 115 of the second Schedule to the Limitation Act, and that it was barred, having been instituted more than three years from the date when the fraud was discovered. This decision was reversed on appeal, the Judge holding that the defendant Torab Ali's breach of an implied contract, which was the cause of action, was a continuing breach, and that the suit was not barred. It has been argued for the appellant that

(1) I. L. R., 6 All., 457. (2) I. L. R., 2 Calc., 393.

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either Arts. 95, 96, or 120 of the second Schedule to the Limitation Act apply to the case, and that the cause of action accrued either on the 29th of May 1873 when Torab Ali drew the balance, or, if not then, on the date when the plaintiffs first became aware of the alleged fraud, and in either case more than six years before the suit was instituted. There does not appear to be any article which applies precisely to this case; the article which appears most applicable is, we think, Art. 61, which provides, a period of three years' limitation from the date when the money is paid, for a suit to recover money payable to the plaintiffs for money paid for the defendant. We do not think that either Art. 95 or Art. 96 apply. The suit is not to obtain relief on the ground of fraud or mistake but to recover a specified sum of money which the plaintiffs have had to pay in consequence of the act of the defendant, Torab Ali. Until that money was paid, the plaintiffs did not suffer any loss. The mere demand by the heirs of Asgar Hossein did not give the plaintiffs a cause of action against the defendants, nor did the institution of the suit. The demand might have been abandoned, or the suit might have been dismissed. And even supposing that the plaintiffs had admitted their liability to the heirs, they would not have suffered any loss until they actually paid the amount claimed; and that is shown by what actually happened in this case when some of the heirs released the plaintiffs from their claims. The plaintiffs do not pretend to say that they are entitled to recover more than what they actually had to pay. We think, therefore, that the cause of action accrued on the 15th of January 1883, the date when the money sued for was paid, and that the suit is not barred by limitation, and we dismiss the appeal with costs.

T. A. P. *Appeal dismissed.*

Before Mr. Justice McDonell and Mr. Justice Beverley.

GOWRI PROSAD KUNDU AND OTHERS (PLAINTIFFS) *v.* RAM RATAN SIRCAR AND OTHERS (DEFENDANTS).*

1886 *April* 19.

Limitation Act, 1877, *Art.* 13—*Suit for refund of sale proceeds paid in accordance with order for distribution under s.* 295, *Civil Procedure Code,* 1882—*Multifariousness.*

In execution of a decree against six persons the plaintiffs had certain property brought to sale, the proceeds of which were brought into Court. The defendants, who held five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, applied to have the amount in Court rateably distributed; and in accordance with an order of the Court, dated 13th September 1880, this was done, the proceeds being distributed in proportion to the amounts of the decrees. In a suit brought on 24th August 1883 against the defendants, on the allegation that the plaintiffs were entitled to the whole of the proceeds, or in the alternative for distribution on a different principle: *Held* the suit was one to set aside the order, and not having been brought within one year from the date of the order was barred by limitation under Art. 13, Sch. II of Act XV of 1877. *Ram Kishan* v. *Bhawani Das* (1) distinguished.

Held, also, that there was no misjoinder of causes of action by reason of all the defendants being included in one suit.

THE plaintiffs obtained a decree against six persons, in execution of which decree certain properties were sold, and a sum of Rs. 2,164 brought into Court as the proceeds of the sale. Meanwhile the defendants had obtained five separate decrees against some of the persons against whom the plaintiffs' decree was obtained, and applied to have the amount in Court rateably distributed between themselves and the plaintiffs. This was done by the Munsiff who, on 13th September 1880, ordered that Rs. 1,178 should be allotted to the plaintiffs, and the balance to the defendants in sums proportionate to the amounts of their decrees. The plaintiffs, on the 24th August 1883, brought the present suit against the defendants under the last clause of s. 295 of the Civil Procedure Code, alleging that they were entitled to

* Appeal from Appellate Decree No. 1844 of 1885, against the decree of C. B. Garrett, Esq., Judge of 24-Pergunnahs, dated the 26th of May 1885, affirming the decree of Baboo Krishna Chunder Chatterji, Subordinate Judge of that district, dated the 28th of June 1884.

(1) I. L. R., 1 All., 333.

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have the entire fund paid over to them. The plaintiffs asked for a decree for the amount received by the defendants, or, if the Court should be of opinion that the defendants were entitled to some share of the proceeds, that the distribution should be made with reference to the extent of the judgment-debtor's share.

The Subordinate Judge found that the suit was, if it was a suit to set aside the order passed under s. 295, barred by limitation, or if not, it was bad for misjoinder of causes of action.

The Judge on appeal held on the authority of *Ram Kishan* v. *Bhawani Dass* (1), that the suit was not one to set aside the order under s. 295, and was not barred by limitation; but that it was bad for misjoinder. He, therefore, dismissed the appeal.

The plaintiffs appealed to the High Court.

Baboo *Girja Sunker Moozoomdar* and Baboo *Guru Dass Banerjee* for the appellants.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Rash Behary Ghose* for the respondents.

The judgment of the Court (McDONELL and BEVERLEY, JJ.) after stating the facts, continued as follows:—

On appeal the Additional Judge held that the suit was not barred by limitation, but that it was bad on the second ground.

Against this latter finding, the plaintiffs have preferred a second appeal, and the respondents seek to uphold the decree of the lower Appellate Court on the ground of limitation. It is contended that they are not at liberty to do this, not having given notice to the other side under the provisions of s. 561 of the Code; but we think that, under the terms of that section, it was not necessary to give the appellants notice.

The Judge has disposed of the question of limitation relying on the authority of the case of *Ram Kishan* v. *Bhawani Dass* (1); but the circumstances of that case were different

(1) I. L. R., 1 All, 333.

from those of the present, and the decision is, therefore, not applicable. In that case it was held that a suit to recover the sale proceeds paid away under an order of the Judge, which was made without jurisdiction, was not a suit to set aside that order, inasmuch as the order itself was a nullity. But in the present case the order of distribution was made by a Court fully competent to make it, and was a good order until set aside.

Moreover, it is not easy to see how any relief could be granted to the plaintiffs without setting aside that order, and in fact the plaintiffs virtually ask to have it set aside, because they ask as an alternative prayer in their plaint that, if they are found to be not entitled to the whole of the assets, those assets may be distributed on a principle different from that adopted by the Munsiff.

We have been referred to two cases decided under Act VIII of 1859—*Gogaram* v. *Kartick Chunder Singh* (1) and *Woomamoyee Burmonya* v. *Ram Buksh Chetlangee* (2), which decided that a suit brought to obtain a refund of sale proceeds paid away by the Court in contravention of the provisions of s. 270 of that Code must be regarded as a suit to set aside the order of the Court. The fourth clause of s. 295 of the present Code runs as follows :—

"If all or any of such assets be paid to a person not entitled to receive the same, any person so entitled may sue such persons to compel him to refund the assets."

Assuming that such a suit may be brought by one of the parties to the distribution as effected by the order of Court, we think it must be regarded as a suit brought by him to set aside that order, and therefore it must be brought within one year from the date of the order. The present suit not having been instituted within that period, we are of opinion that it is barred by limitation under Art. 13, Sch. II, of the Limitation Act.

On the other point we are clearly of opinion that the suit should not have been thrown out for misjoinder of parties. In

(1) B. L. R., Sup. Vol., 1022 ; 9 W. R., 514.
(2) 16 W. R., 11.

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the case of *Brojo Nath Chuckerbutty* v. *Baney Madhub Dischit* (1), it was held that, in a suit, brought to set aside an order under s. 270 of Act VIII of 1859, all the parties to the distribution ought to be made parties to the suit. We find that a similar view was expressed in a recent decision by a Divisional Bench of this Court in Appeal from Original Decree 291 of 1884, decided on 8th September 1885, in respect of suits under s. 295 of the present Code. In this case, it was absolutely necessary that the Court should have before it all the parties to the distribution if it was to decide whether that distribution had been effected upon a proper principle.

Moreover, under ss. 28, 31 and 45 of the Code, it would seem that the suit should not have been dismissed on this ground. As we have held, however, that the suit is barred by limitation, the appeal is dismissed with costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Ghose and Mr. Justice Grant.

AHMED MIRZA SAHEB AND ANOTHER (PLAINTIFFS) *v.* A. THOMAS, EXECUTOR TO THE ESTATE OF THE LATE MR. J. P. WISE AND OTHERS (DEFENDANTS).*

1886 *May* 27.

Court Fees Act (VII of 1870), *Sch. I and Sch. II, Art.* 7, *cl.* 3—*Suit after rejection of claim to attached property—Ad valorem Stamp.*

In execution of a decree by the defendant, certain property was attached as being that of the judgment-debtor. The plaintiff preferred a claim, but his claim was disallowed, and the property ordered to be sold. In a suit to have it declared that the property belonged to the plaintiff: *Held* it was a suit in which consequential relief was asked for, and that the *ad valorem* duty prescribed by Schedule I of the Court Fees Act was payable on the plaint, and not that provided by Schedule II, Art. 17.

Jalaluddin Mahomed v. *Shohorullah* (2) followed.

IN execution of a decree obtained by the defendants against the plaintiffs' father Mahomed Mirza, certain properties were attached, to a share of which the plaintiffs alleged they were

* Appeal from Appellate Decree No. 2533 of 1885, against the decree of J. F. Bradbury, Esq., Judge of Backergunge, dated the 3rd of September 1885, affirming the decree of Baboo Beni Madhub Mitter, First Subordinate Judge of that district, dated the 24th of April 1885.

(1) 23 W. R., 434. (2) 15 B. L. R., Ap. 1 ; 22 W. R., 422.

entitled, and to which they accordingly preferred a claim: that claim was struck off the file for default in prosecution. The plaintiffs petitioned for a review of the order striking off the claim, but the application was rejected. The plaintiffs then brought this suit to establish their right and title to the share they claimed in the disputed properties. The prayer of the plaint was: "(1) that a decree may be passed declaring the shares of the properties under claim to be the property of the plaintiffs; (2) that a decree may be passed for costs of Court with interest; (3) that the Court may be pleased to grant any other relief which it may deem the plaintiffs entitled to according to equity."

The plaint bore a Court-fee stamp of Rs. 10. The Subordinate Judge was of opinion that the plaint should be stamped according to the value of the properties in dispute, and gave the plaintiffs time to affix the proper stamp; and on the order not being complied with, he dismissed the suit. On appeal, this decision was affirmed by the Judge. The plaintiffs appealed to the High Court.

Baboo *Durga Mohan Dass* for the appellants.

Baboo *Rash Behari Ghose* for the respondents.

The following cases were cited:—*Chunia* v. *Ram Dial* (1); *Gulzari Mal* v. *Jadaun Rai* (2); *Fatima Begam* v. *Sukh Ram* (3); *Manraj Kuari* v. *Radha Prasad Singh* (4); and *Dhondo Sakharam Kulkarni* v. *Govind Babaji Kulkarni* (5) in favor of the appellants; and *Jalaluddin Mahomed* v. *Shohorullah* (6) for the respondents.

The judgment of the Court (GHOSE and GRANT, JJ.) was as follows:—

The only question we have to decide in this appeal is whether the lower Courts were right in holding that the plaint was insufficiently stamped, because the stamp duty payable was not Rs. 10 under cl. 3, Art. 17, Sch. II of the Court Fees Act, but the *ad valorem* fee as prescribed by Sch. I of the said Act.

(1) I. L. R., 1 All., 360.
(2) I. L. R., 2 All., 63.
(3) I. L. R., 6 All., 341.
(4) I. L. R., 6 All., 466.
(5) I. L. R., 9 Bom., 20.
(6) 15 B. L. R., Ap. 1; 22 W. R., 422.

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AHMED MIRZA SAHEB v. THOMAS.

It appears that, in execution of a certain decree obtained by one Thomas against Mahomed Mirza, the property in suit was attached as belonging to the judgment-debtor. The plaintiff preferred a claim, but his claim was disallowed, and the property in question was ordered to be sold. Thereupon, the plaintiff brought the present suit to have it declared that the property belonged to him and not to Mahomed Mirza.

It seems to us that this was a suit where consequential relief was asked for. It was a suit which was brought for the purpose of establishing the plaintiffs' right to the property in question, and with a view to free the property from the attachment which had been put upon it, and to protect it from being sold as the property of Mahomed Mirza. In this view of the matter, we are of opinion that the suit would not fall within Art. 17 of the Sch. II of the Court Fees Act, and that the *ad valorem* duty as prescribed by Sch. I was payable upon the plaint.

Our attention has been called to certain decisions of the Bombay and Allahabad High Courts. No doubt these decisions are in favor of the view taken by the appellant, but they are opposed to a ruling of this Court—*Jalaluddin Mahomed* v. *Shohorullah* (1), and from enquiry we have made upon the subject, it appears that this ruling has been for several years followed in this Court in taxing and levying Court-fees payable upon petitions of appeal. We agree in the principle laid down in the said ruling, and accordingly dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Norris and Mr. Justice Macpherson.

SUNGUT LAL (PLAINTIFF) *v.* BAIJNATH ROY AND OTHERS (DEFENDANTS).*

1886 *June* 17.

Interest—Interest at increased rate—Penalty—Contract Act, ss. 60, 74—*Appropriation of payments.*

In consideration of an advance of Rs. 118, the defendants executed in favor of the plaintiff a mortgage bond, dated 3rd November 1879, by which

* Appeal from Appellate Decree No. 631 of 1886, against the decree of Baboo Bolae Chand, Subordinate Judge of Bhagulpore, dated the 26th of December 1885, modifying the decree of Baboo Kali Kumar Bose, Munsiff of Beguserrai, dated the 30th of December 1884.

(1) 15 B. L. R., Ap. 1; 22 W. R., 422.

it was stipulated that the amount should be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first class rates, and in case the same is not paid in kind, it will be paid principal with interest from the date of execution at one anna per cent. per mensem in cash in the month of Baisakh 1287 F.S. (April 1880)." The defendants admitted execution of the bond, and pleaded payments in grain to the amount of Rs. 136, which they failed to prove. It was found that the plaintiff had received payments in grain to the extent of Rs. 71, more than half of which, however, he claimed to be entitled to appropriate to the payment of other antecedent debts which were due to him by the defendants. It was not stated at the time of payment towards which debt the payments were to be applied; but all the payments were admittedly made in kind: *Held*, that the plaintiff was not entitled to appropriate the payments to the antecedent debts, inasmuch as, within the meaning of s. 60 of the Contract Act, there were "other circumstances" indicating that the payments were made in liquidation of the amount of the bond. *Held*, also, that the increased rate of interest being made payable from the date of the bond, and not only from the breach of the contract, must be taken to be in the nature of a penalty and only to be taken into consideration as a basis upon which damages for the breach of contract were to be estimated. The principle on this subject laid down in the case of *Mackintosh* v. *Crow* (1) approved of.

THIS suit was brought for the recovery of Rs. 464-14, being the amount of principal and interest due on a registered mortgage bond, dated the 4th Kartick 1287 F.S. (3rd November 1879), alleged to have been executed by the defendants Baijnath Roy and Nunku Roy in favor of the plaintiff for Rs. 118-1. The condition in the bond was that the amount was to be repaid "in kind by delivery of half the amount of the rubbi crops of every description produced at the first-class rates, and, in case the same is not paid in kind, it will be paid principal, with interest, from the date of execution at one anna per cent. per mensem in cash in the month of Bysack 1287 F.S. (April-May 1880), by the defendants, and the mortgage will be thereby redeemed."

The plaintiff admitted having received Rs. 33-7 in grain towards the payment of the debt.

The defendants admitted execution of the bond, but stated that they had paid in grain Rs. 136 from time to time in repayment

(1) I. L. R., 9 Calc., 689.

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of the amount borrowed; they also pleaded that the plaintiff ought not to recover interest at the rate claimed, which was inserted in the bond as a penalty and imposed to obtain the speedy realization of the money covered by the bond.

On the evidence it appeared that the plaintiff had received payments in grain to the amount of Rs. 71 from the defendants, but had appropriated all but Rs. 33-7 to other debts which were undisputed due from them to him. The Munsiff held that he was justified in doing this, and that the defendants had failed to prove their payments of Rs. 136. He held also that the interest was at a penal rate to which the plaintiff was not entitled. He gave a decree for the principal Rs. 118 and the same amount for interest, making Rs. 236, with costs in full and interest at 6 per cent per annum. From this decision the defendants appealed and the plaintiff preferred a cross appeal. The defendants contended that the decision was wrong in not allowing their alleged payments to be credited, and in awarding costs at the full amount. The plaintiff questioned the decision of the Munsiff in respect of the award of interest at a lower rate than that stipulated for.

The Subordinate Judge held that the defendants were entitled to be credited with the Rs. 71 admitted by the plaintiff to have been paid, inasmuch as the plaintiff was not entitled under the circumstances to appropriate the payments to other debts, without showing, as he had failed to do, that the payments were actually made in respect of the other debts. He said: "As according to the terms of the bond the defendants were to pay a penalty in default of paying grain as stipulated, it must be held that what they paid was towards the satisfaction of the bond, unless the contrary was shown, and that it could in no way be justifiable to allow the plaintiff to credit the grain paid by the defendants to some other account, and make the defendants pay a penalty at a heavy rate of interest on the ground of default which they actually did not make."

The Subordinate Judge gave a decree for Rs. 47, the amount of principal after deducting Rs. 71, with costs on the proportionate sum decreed and 6 per cent interest. He refused to allow any of the interest claimed on the bond, being of opinion,

for the reasons stated by them above, that the plaintiff had not been dealt fairly by the defendants.

The plaintiff appealed to the High Court.

Baboo *Nilkant Lahory* for the appellant.

Baboo *Kishorey Lall Goswami* for the respondents.

The following cases were cited in argument :—

For the appellant—*Peetambur Chatterjee* v. *Kalee Churn Roy* (1); *Rashesur Surmah* v. *Kaleekanath Surmah* (2); *Shah Mahkanlal* v. *Srikrishna Singh* (3); *Sobodra Beebee* v. *Deendyal Lall* (4); *Kemble* v. *Farren* (5); *Omda Khanum* v. *Brojendro Coomar Roy Chowdhry* (6); *Brojokishore Roy* v. *Madhub Persad Misser* (7); *In the matter of the petition of Nobocoomar Bose* (8); *Mackintosh* v. *Crow* (9); *Balkishen Das* v. *Run Bahadur Singh* (10); *Behary Lall Doss* v. *Tez Narain* (11).

For the respondent.—*Bichook Nath Panday* v. *Ram Lochun Sing* (12); *Boley Dobey* v. *Sideswar Rao Baboo Roy Kur* (13); *Muthura Persad Sing* v. *Luggun Kooer* (14).

The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows :—

We are of opinion that this appeal should be dismissed.

Two grounds have been taken by the learned pleader for the appellant. In the first place, he complains that the Court below was wrong in not allowing his client, the plaintiff, to allocate

(1) 11 B. L. R., 137 note; 14 W. R., 436.
(2) 11 B. L. R., 138 note; 11 W. R., 445.
(3) 2 B. L. R. P. C., 44.
(4) 11 B. L. R., 438 note.
(5) 3 M. & P., 425., S. C.; 6 Bing., 141.
(6) 12 B. L. R., 451; 20 W. R., 317.
(7) 12 B. L. R., 456 note; 17 W. R., 373.
(8) 12 B. L. R., 457 note; 17 W. R., 431.
(9) I. L. R., 9 Calc., 689.
(10) I. L. R., 10 Calc., 305.
(11) I. L. R., 10 Calc., 764.
(12) 11 B. L. R., 135; 19 W. R., 271.
(13) 4 B. L. R. Ap., 92.
(14) I. L. R., 9 Calc., 615.

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SUNGUT LAL v. BAIJNATH ROY.

the money value of the grain payments made by the defendants to him towards the extinction of certain debts due from the defendants to the plaintiff, before the execution of the mortgage bond upon which this suit is brought; and he based his contention upon s. 60 of the Contract Act. That section says: "Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits."

It is impossible to say that there are here "no other circumstances" indicating to which debt the payment was to be applied. There is not only no evidence on the record to show that there had been an agreement between the parties that the antecedent debt or debts should be liquidated by payments of grain, but there is specific evidence that this one debt—the debt upon this bond—should be liquidated by payments in kind and not in money. We think, therefore, that the Courts below were abundantly right in disallowing the plaintiff's claim to allocate these grain payments towards the extinction of the debts due before the execution of this bond.

The second ground upon which the learned pleader relies is this, that the Courts below are in error in having treated the interest mentioned in the bond as a penalty and not as liquidated damages.

The exact terms of the bond are not set out in the plaint: they have been read to us; they amount to this, that there is a present advance of Rs. 44-1, and bygone debts amounted to Rs. 73-15, and the mortage was in consideration of Rs. 118. There was a stipulation that, if the whole mortgage debt was not repaid by deposit of crops by Bysakh 1287, then one per cent. per mensem as interest should be charged, not from the breach of the contract, that is to say, not upon the failure to deliver any of the specified quantities of the grain at the specified time, but the interest was to run from the date of the bond. A great many cases as to whether this, under the circumstances, is to be considered as penalty or liquidated damages have been cited before us.

The case which the learned pleader for the appellant has relied upon most strongly is the case of *Behary Lall Dass* v. *Tej Narain* (1). That case was decided by Mr. Justice Tottenham and myself, and though in that case no reference is made to a good many of the cases, which have been cited here, and though the distinction which is drawn by Mr. Justice Wilson in the case of *Mackintosh* v. *Crow* (2) is not there taken, yet the distinction does, as a matter of fact, exist, and though it is not the *ratio decidendi* in that case, it none the less exists. In the case of *Behary Lall Dass* v. *Tej Narain* (1) the increased rate of interest became due upon the breach of covenant and not from the date of the original bond. Now, the distinction seems to be, as we think, perfectly well drawn by Mr. Justice Wilson. In giving judgment in the case of *Mackintosh* v. *Crow* (2), he points out that practically s. 74 of the Contract Act has done away with the distinction between a penalty and liquidated damages, which, he says, "must be borne in mind in dealing with cases decided before the Contract Act, many of which turned upon this distinction. Under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated much as a penalty was before as the maximum limit of damages."

Then he proceeds to point out the distinction between the increased rate of interest to be paid from the date of breach and the increased rate of interest to be paid from the date of the bond. We think that distinction is a well-founded one, and, upon the strength of that distinction, we ought to hold that this interest is in the nature of a penalty and only to be taken into consideration as a basis upon which damages for breach of contract are to be estimated. That being so, we see no reason to interfere with the rate of damages at which the lower Appellate Court has arrived. We, therefore, think that this appeal ought to be dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) I. L. R., 10 Calc., 764.
(2) I. L. R., 9 Calc., 689.

CIVIL REFERENCE.

Before Mr. Justice Wilson and Mr. Justice Porter.

1886
July 10

FAJALEH ALI MIAH (PLAINTIFF) *v.* KAMARUDDIN BHUYA (DEFENDANT.)*

Compromise of suit—Compromise extending beyond the terms of the suit—Civil Procedure Code (Act XIV of 1882), *s.* 375—*Compromise, Modification of terms of.*

The only compromise which a Court can in any case be bound under s. 375 of the Code of Civil Procedure to enforce, is one which adjusts, wholly or in part, the suit; matters going beyond the suit cannot, if included in a compromise, be so enforced.

A Court refusing to grant a decree on a compromise going beyond the suit, cannot however grant a decree modifying the terms of the proposed compromise, but must leave the parties to proceed with the suit as they may be advised.

REFERENCE under s. 615 of the Code of Civil Procedure.

The plaintiff sued on a bond executed by the defendant under which the latter had borrowed from the former Rs. 10 agreeing to pay interest at the rate of nine pie per mensem, or Rs. 56 four annas per cent. per annum. The total amount of principal and interest due under the bond at the time of suit amounted to Rs. 29.

On the day of hearing, the defendant entered into a compromise with the plaintiff, whereby he bound himself to pay Rs. 22 in satisfaction of the whole claim including costs, agreeing to pay such amount on the 5th Magh 1292, B.S., or on failure so to do, to pay interest at the rate of Re. 1 per diem on the whole amount. A petition embodying these terms was filed, and the Court passed a decree in accordance therewith, contingent on the opinion of the High Court as to (1) whether the Civil Courts can take cognizance of a compromise entered into by parties in a pending case whereby one of such parties agrees to pay a usurious rate of interest, and whether a decree can be passed thereon under s. 375 of the Code of Civil Procedure; and (2) whether the Civil Courts have power to refuse to grant

* Civil Reference No. 2 A of 1886, made by Baboo Khetra Mohan Mitra, Munsiff of Begamgunge, dated the 18th of January 1886.

a decree upon such a compromise, granting, however, a decree modifying such terms:—

No one appeared on the reference for either party.

The opinion of the Court (WILSON and PORTER, JJ.) was as follows:—

The only compromise which a Court can in any case be bound under s. 375 of the Civil Procedure Code to enforce is one which adjusts the suit wholly or in part—not one which goes beyond the suit.

The compromise proposed in the present case embodies a new contract, much wider in its scope than the mere adjustment of the claim in suit. We think, therefore, that the Small Cause Court Judge is not bound to enforce it, and, if not so bound, he is certainly right to refuse.

He cannot, however, modify it. He must leave the parties to proceed with the case as they may choose.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Agnew.

CHAIRMAN OF THE NAIHATI MUNICIPALITY (1ST PARTY, CLAIMANT) *v.* KISHORI LAL GOSWAMI (2ND PARTY, CLAIMANT) AND THE COLLECTOR UNDER ACT X OF 1870.*

1886 *May* 28.

Bengal Municipal Act (Beng. Act V of 1876,) *s.* 32—*Municipal Corporations—Commissioners—Right of way—Compensation—Land Acquisition Act, X of* 1870.

Section 32 of Act V of 1876, the Bengal Municipal Act, enacts that "all roads, bridges, embankments, tanks, ghats, wharves, jetties, wells, channels and drains in any Municipality (not being private property), and not being maintained by Government or at the public expense, now existing, or which shall hereafter be made, and the pavements, stones and other materials thereof, and all erections, materials, implements and other things provided therefor, shall vest in, and belong to, the Commissioners."

Held, that the word "roads" in this section does not include the soil beneath the roads.

* Appeal from Original Decree No. 292 of 1884, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 2nd of August 1884.

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CHAIRMAN OF THE NAIHATI MUNICIPALITY v. KISHORI LAL GOSWAMI.

THIS was an appeal from an order of reference made by Baboo Radha Binod Bisha, Special Deputy Collector, under s. 15 of Act X of 1870 to the Judge of the Court of the district of the 24-Pergunnahs in respect of certain lands acquired for the East Indian Railway Company, for purposes in connection with the Hooghly Bridge. The grounds of the reference are thus stated by the Deputy Collector: "The question for adjudication in this case is one of title to land. The Naihati Municipality, having acquired good title to the land both by adverse possession of more than twelve years, as also under s. 32 of Beng. Act V of 1876, claims, through its Chairman, the ownership of the land and the amount of compensation awarded for it. But the intervenor, Kishori Lal Goswami, opposes the claim, and demands the compensation for the land, on the allegation that the land being situated in Mouzah Garifa, appertaining to his revenue-paying estate Habilishahar, towzi No 1193, it forms part and parcel of his estate."

In giving judgment on the reference the District Judge said: "This is an apportionment case, the contest being between the zemindar of Garifa and the Naihati Municipality. It is admitted in the letter of reference and cannot be denied that the land in dispute is part of Kishori Lal Goswami's zemindari. It is included in his village of Garifa, and the plots are marked in the survey map of the village. The zemindar has also proved by his naib that the land is in his zemindari. The claim of the Naihati Municipality is based on the ground that the land in dispute forms part of a public road within the Municipality. The land taken up was over a road leading from the village to the river bank, and is known as the Senpara Bathing Ghat Road. The Municipality thereon found a claim to be the owner of the soil, and asserts that they have been holding the land for twelve years adversely to the zemindar. But it is plain that they have no right to the land, they have no grant for it, nor did they acquire it under the Land Acquisition Act or in any other way. The road-way was theirs, but the soil remained with the zemindar. It is only a very few years ago that they took possession of the road and repaired and widened it; no doubt the public used the road before that, and possibly the

public acquired a right of way, but this would not give the public or the Naihati Commissioners a right to the land."

The District Judge found that the Municipality had got Rs. 300 compensation in respect of their right of way over the road, and he held that the zemindar was entitled to the remainder, namely, Rs. 230. The Naihati Municipality appealed to the High Court.

Baboo *Unnoda Pershad Banerjee*, for the appellant.

Dr. *Troilokya Nath Mitter* for the respondent.

The judgment of the Court (O'KINEALY and AGNEW, JJ.) was as follows :—

This is an appeal from the decision of the Judge of 24-Pergunnahs on a reference under the Land Acquisition Act, X of 1870.

The Municipality claimed compensation for the whole soil, on the ground that they have a title to the property under s. 32 of Act V of 1876. The zemindar claims the money on the ground that the soil is his. Therefore what we have to decide is, whether, under s. 32 of Act V of 1876, the Municipality got all the sub-soil under the public way. Section 32 runs as follows: "All roads, bridges * * * * and the pavements, stones and other materials thereof, and all erections, materials, implements, and other things provided therefor, shall vest in and belong to the Commissioners."

If therefore the word "road" carried with it all the soil, all the materials, and all the erections on it, this enumeration, in express words, of "pavements," "stones," &c., would be unnecessary. Clearly then there must be some limitation to the word "road." It does not mean everything above and below the road; and we think, looking at the case of *The Vestry of St. Mary, Newington* v. *Jacobs* (1) that the sub-soil did not belong to the Municipality.

We therefore dismiss the appeal with costs.

P. O'K. *Appeal dismissed.*

(1) L. R., 7 Q. B., 47.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

1886
May 20.

JODOONATH MUNDUL (DECREE-HOLDER) *v.* BROJO MOHUN GHOSE (JUDGMENT-DEBTOR) AND RAJ NARAIN GHOSE (AUCTION-PURCHASER.)*

Appeal—Sale in Execution of Decree—Civil Procedure Code, s. 294—Application for leave to bid—Decree-holder.

No appeal lies from an order passed under s. 294 of the Civil Procedure Code refusing permission to a decree-holder to bid at a sale in execution of his decree.

IN this case Jodoonath Mundul obtained a decree for arrears of rent against Brojo Mohun Ghose and others, and in execution of that decree he attached certain property belonging to the judgment-debtor, Brojo Mohun Ghose, and obtained an order for sale. He then applied to the Court executing the decree for permission to bid at the sale, but his application was rejected. From the order rejecting his application the decree-holder appealed to the High Court.

Baboo *Nil Madhub Bose* for the appellant.

Baboo *Bhubun Mohun Dass* for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was delivered by

PRINSEP, J.—This is an appeal against an order passed by the Munsiff refusing to give the decree-holder premission to purchase at a sale held in execution of a decree.

In our opinion no appeal lies against such an order. The appellant's pleader contends that an appeal lies under s. 588, cl. 16, but that clause seems to us to allow an appeal only against an order under s. 294 confirming or setting aside or refusing to set aside a sale of immoveable property, and not against an order refusing to give a decree-holder permission to bid. The appeal must therefore be dismissed with costs.

Appeal dismissed.

P. O'K.

* Appeal from Order No. 73 of 1886 against the order of Baboo Gopal Chunder Banerji, Munsiff of Bonegram in Jessore, dated the 28th of December 1885.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Grant.

GOLUCK CHANDRA PAL AND OTHERS (PETITIONERS) *v.* KALI CHARAN DE (OPPOSITE PARTY.)*

1886 *April* 30.

Criminal Procedure Code, s. 145—*Penal Code, s.* 188—*Disobedience to order of Public Servant—Inquiry as to possession—Parties to inquiry.*

In May 1883 the District Magistrate of Tipperah held an inquiry as to the possession of certain lands claimed by *A* and *B*, and having found on the evidence taken by him that *A* was in possession, he passed an order on the 21st of May 1883, declaring that *A* was entitled to hold possession of the disputed land until evicted in due course of law, and forbidding *B* and all others to disturb *A's* possession until such disturbance should be effected in due course of law. Previously to November 1885, *B* sold an eight-anna share of his interest in the disputed land to *C*, who at the time of his purchase had notice of the order of the 21st of May 1883. In November 1885, *B* and others went to the disputed lands, and attempted to turn *A* out of possession by force, and to compel the tenants of the lands to pay rent and give kabuliats to *B* and *C*. At the time that *B* and his companions went to the disputed land, the latter were aware of the order of the 21st of May 1883, though none of them was a party to the inquiry then made by the District Magistrate. In December 1885, they were all tried and found guilty of disobedience to an order duly promulgated by a public servent. *Held*, that the conviction was right.

Semble, that a reference by a Magistrate to a Police report which clearly sets out the probability of a breach of the peace is a sufficient statement of the reasons for the Magistrate's being satisfied of the existence of a dispute likely to cause a breach of the peace, within the meaning of s. 145 of the Code of Criminal Procedure.

IN this case one of the accused, Bukshi Shonar, was tried and convicted under s. 145 of the Penal Code for harbouring persons hired for an unlawful assembly, while the others were tried and convicted for disobedience to an order duly promulgated by a public servant under s. 188 of the Penal Code. The facts of the case are as follows :—

Early in 1883, a dispute arose between Kutubudin, one of the accused, and rival zemindars named Nag as to the ownership

* Criminal Revision No. 72 of 1886, against the order passed by Baboo Sarat Chandra Das, Deputy Magistrate of Tipperah, dated the 22nd of December 1885.

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GOLUCK CHANDRA PAL v. KALI CHARAN DE.

of a certain piece of land of which both parties claimed to be in possession. In May 1883, the District Magistrate, Mr. Hopkins, in consequence of certain reports which he had received from the Police, held a proceeding under s. 145 of the Code of Criminal Procedure, and having come to the conclusion on the evidence that the Nag zemindars were in possession of the disputed lands, he recorded an order declaring that the Nag zemindars "are entitled to retain possession of Jowar Nilakhi," the disputed land, "until evicted in due course of law, and all parties, Kutubudin and all others, are forbidden to disturb such possession until such disturbance is effected in due course of law." This order was passed on the 21st of May 1883. Kutubudin applied to the Sessions Judge to cancel the order of the District Magistrate, but the application was rejected.

Some time before November 1885, Kutubudin sold a moiety of the disputed land to one Abdul Baree, who purchased with full knowledge of the order of the 21st of May 1883, and on the 21st of November 1885, one Kali Charan De, the tahsildar of the Nag zemindars, complained to the District Magistrate that Kutubudin and the other accused had gone in a body to Nilakhi armed with *latties* and spears, and had by force extorted money from the ryots of that place, and forced them to sign kabuliats in favour of Kutubudin and Abdul Baree. The District Magistrate made over the case to the Deputy Magistrate, who found that all the accused, with the exception of Bukshi Shonar, had, with full knowledge of the order of the 21st of May 1883, gone to Nilakhi for the purpose of supporting the claims of Kutubudin and Abdul Baree; he found the charge made by the tahsildar proved as against all but Bukshi Shonar, whom he found guilty of harbouring the others, knowing that they had been employed to become members of an unlawful assembly, and he sentenced them some to imprisonment and some to pay a fine. These findings and sentences were upheld by the District Magistrate on the 7th of January 1886. Thereupon the accused applied to the High Court under the provisions of s. 439 of the Code of Criminal Procedure, and obtained a rule calling upon the other side to show cause why the convictions should not be set aside.

case of dispute regarding a julkur right, or a case of dispute for possession of land covered with water. If it were a case of possession of land covered by water, and the right to fish was the ordinary right of a person who owned the land, clearly the Magistrate would have jurisdiction. On the other hand, if what he has decided was merely the right to fish and nothing more, the cases in this Court go to show that the Magistrate could not decide the case. Therefore, as I have already said, what we have to decide is, whether the Magistrate tried this as a case for possession of land covered with water, or simply as a dispute about the right to fish.

The Magistrate says: "I do decide and declare that she is in possession of the said fishery from G. to H." * * * *; and there is nothing to show that the Magistrate tried this case as for possession of land covered with water.

That being so, we must set aside the order of the Deputy Magistrate.

Order set aside.

P. O'K.

PRIVY COUNCIL.

DHARANI KANT LAHIRI CHOWDHRY (PLAINTIFF) *v.* KRISTO KUMARI CHOWDHRANI AND ANOTHER (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

P. C.*
1886
February 7 & 18.
March 6.

Benami transaction.—Purchase in the name of Hindu wife.

The question for decision was whether a purchase in 1842, in the name of a Hindu wife, of an interest in part of her husband's ancestral estate, was for herself, or for her husband, her name being used *benami* for him.

The High Court, at the hearing in appeal, considered certain previous decisions in cases arising out of *benami* transactions. But in arriving at its conclusion, which was that the property was the wife's, it proceeded entirely on the evidence in the particular case. The judgment of the Judicial Committee, which also went upon the evidence, was, on the contrary, that the husband was, in fact, the purchaser, the purchase being *benami*, in his wife's name.

* *Present:* LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR R. COUCH.

1886

DHARANI KANT LAHIRI CHOWDHRY v. KRISTO KUMARI CHOWDHRANI.

APPEAL from a decree (6th February 1882) of the High Court (1), reversing a decree (9th April 1880) of the Subordinate Judge of Mymensingh.

The decree of the High Court, against which this appeal was preferred, had the effect of maintaining the title of the principal defendant, Srimati Chowdhrani, in a three gundas share in zemindari lands in Pergunnah Sherpur, Zillah Mymensingh. She died pending this appeal; the respondents, who were entitled to any interest in the property that she might have, being substituted for her, under an order in Council of 22nd March 1884.

The object of the suit was to obtain a declaration of proprietary title (subject to an outstanding mortgage on part of the property), in the plaintiff to a three gundas share in the estate above named, formerly belonging to Goluck Nath Chowdhry, husband of Srimati Chowdhrani, the defendant. The plaintiff claimed as purchaser at an execution sale on 6th September 1871, at which sale he bought the right, title, and interest of Goluck Nath in a twelve annas share in the land. It was the plaintiff's case that such share included the three gundas share in suit, although the latter stood in the name of Srimati Chowdhrani, wife of Goluck Nath, having been bought in by him at the sale, and the conveyance taken in his wife's name.

The defendant Srimati Chowdhrani contended that she had, out of her own funds, purchased the three gundas share on the 9th of June 1842, when her husband's interest therein was sold at the suit of Government, in discharge of certain liabilities under which he had come.

The Subordinate Judge was of opinion that Goluck Nath had furnished the money for the purchase, using his wife's name for taking the conveyance, *benami*, for himself; and that he had afterwards remained in possession. He found that Srimati Chowdhrani was without funds of her own wherewith to make the purchase.

On appeal, the High Court (MCDONELL and FIELD, JJ.) found that the evidence was in favor of there having been an actual purchase on behalf of Srimati Chowdhrani. The judgment,

(1) I. L. R., 8 Calc., 545; *Chowdhrani* v. *Tarini Kant Lahiri Chowdhry.*

which is reported in the volume of these reports for 1882 (1) refers to the decisions on the subject of the presumptions, said to have arisen in cases somewhat analogous. The Court declined to recognise any rule that, in the absence of evidence showing the source of the purchase-money, there was a presumption that property purchased by a Hindu wife had been acquired with her husband's money. The question at issue was decided entirely upon the evidence in the particular case, and the judgment of the Court of first instance was reversed.

On this appeal,—

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, appeared for the appellant.

Mr. *H. Cowell* for the respondent.

Reference was made to *Sreeman Chunder Dey* v. *Gopal Chunder Chuckerbutty* (2); *Raja Chunder Nath Roy* v. *Ramjai Mazumdar* (3), in regard to the burden of proof, and the presumptions arising from the position of the parties.

On a subsequent day, 6th March, their Lordships' judgment was delivered by

SIR R. COUCH.—At a sale on the 6th of September 1871, in execution of a decree against one Goluck Nath Chowdhry, the original appellant, Tarini Kant Lahiri Chowdhry, who has died during this appeal, became the purchaser, for Rs. 61,100, of whatever right, title, and interest Goluck Nath had in 12 gundas out of a share of 1 anna 15 gundas of the zemindary No. 144 of Pergunnah Sherpur in the Zillah Mymensingh, and received the sale certificate of the Court, dated the 30th November 1871. It does not appear that he took any steps upon this purchase to obtain registration of his name, but upon Srimati Chowdhrani, the widow of Goluck Nath (he having died in the meantime), making an application, under Bengal Act VII of 1876, to the Deputy Collector of Mymensingh to have her name registered in respect of the three gundas share of the 1 anna 15 gundas, he objected, on the ground that she had no share in the estate, and was not

(1) I. L. R., 8 Calc., 547. (2) 11 Moore's I. A., 28.
(3) 6 B. L. R., 303.

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entitled to registration. The title of Srimati Chowdhrani was said to be founded on a purchase by her, at a sale on the 9th of June 1842, of the three gundas share, part of 12 gundas, of which her husband Goluck Nath was then the proprietor, by the Collector of Mymensingh, in satisfaction of a claim of the Government against Goluck Nath as surety for one Jugal Kishore Sen, who was employed in the Mymensingh Collectorate. The appellant contended that this purchase was a *benami* transaction, and that Goluck Nath was the real owner of the three gundas when the sale to him was made. The Deputy Collector rightly refrained from deciding that question. He found that Srimati, subsequently to her purchase, obtained registration of her name as proprietress jointly with the other proprietors, but did not find the date of it more precisely. He found that the ijardar, who will be referred to afterwards, was in possession for her, and that her name was in the previous register of proprietors, and ordered her to be registered as proprietress of what he described as equivalent to the three gundas share. This order was made on the 28th February 1878, and in consequence of it the present suit was instituted, on the 27th of February 1879, by the appellant against Srimati and her son Hurro Coomar Chowdhry. The plaint prayed that the plaintiff's title to the three gundas might be declared, and his name be directed to be registered in respect thereof. The written statement of Srimati stated that she made the purchase *bonâ fide*, and really for herself, with the money of her own funds and own *stridhan*.

Goluck Nath was the son of Rama Nath, one of five brothers, each of whom had a share of six gundas in the estate. On the death of Rama Nath, Goluck Nath became entitled to his six gundas. He afterwards inherited the six gundas of one of his uncles, and, being thus entitled to twelve gundas, became surety for Jugal Kishore Sen, and pledged one-fourth of his then share in the property. This fourth was the three gundas sold on the 9th of June 1842. Subsequently Goluck Nath inherited the share of another uncle, and he then sold a twelve-gunda share to one Shib Dyal Tewari, and, upon the same date, he and his wife Srimati executed, in favour of Shib Dyal Tewari, an ijara, or usufructuary mortgage, of a further six

gundas share for the period of 26 years. The date of this ijara is the 6th December 1859. Its not having expired when the suit was brought is the reason that the plaint prayed for a declaration of title only and not for possession. After this sale and mortgage Goluck Nath inherited the share of another uncle, and thus, at the time of the execution sale in September 1871, there were twelve gundas, of which Goluck Nath was clearly entitled to nine, and the remaining three are the subject of the present suit.

The certificate of the sale on the 9th of June 1842 states that the property was purchased by Doorga Pershad Roy, the mookhtar of Srimati Chowdhrani, of Girda, in Pergunnah Sherpur, for the sum of Rs. 560; and that on payment of the earnest money a proceeding was passed by the Dacca Commissioner, on the 15th July 1842, sanctioning the sale, and thereupon the said purchaser paid the whole amount of the purchase-money into the public treasury. The evidence for the plaintiff was that Doorga Pershad Roy, who had died before the trial, was the servant of Goluck Nath and served him as naib, and was said by Hurro Coomar Chowdhry not to have been his mother's servant before the sale; that the earnest money, about 100 or 125 rupees, was paid to Doorga Pershad by Goluck Nath, that Goluck Nath paid the purchase-money, and borrowed it from Madari Lal Bajpai and gave a bond for it. Madari Lal, who was living, and was said to have a house in Rae Bareli, was not called. A witness also deposed that Nobo Coomar Chowdhry, a cousin of Goluck Nath, who was present at the sale and purchased other properties, told Goluck Nath to keep this property. There were several sureties whose property was sold at the same time. The evidence of Srimati herself, who was examined as a witness, was that Doorga Pershad Roy purchased for her, and she paid the purchase-money; that she gave him Rs. 1,000 out of Rs. 3,000 which she had from presents on the occasion of her marriage and money her mother-in-law left her. She said that she did not tell her husband anything about the auction sale; she did not tell him she would purchase the property, and he did not tell her anything about the purchase of that property. She was about 23 or 24 years of age when her mother-in-law died, which was about a year

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before. She was supported in this account of the transaction by two of her witnesses. The Subordinate Judge, a Hindu, who found that the purchase was a *benami* one, said it was unlikely and incredible that she, a purdah-nashin lady in a Hindu family, and the wife of a respectable zemindar, should herself bring the money and give it to an officer; that there should have been one or two unconnected persons present; and that they witnessed that fact. The High Court, on the contrary, were of opinion that the story told by the plaintiff's witnesses of the manner in which Goluck Nath supplied the money with which the purchase was made was "not in itself a very credible one," and they said that the impression which the evidence left upon their minds was that Srimati had funds of her own, and that with a portion of these funds this share in the property was purchased. In this conflict of opinions their Lordships are disposed to prefer that of the Subordinate Judge, who saw the witnesses, and would be better acquainted with the habits of Hindu ladies than the Judges of the High Court could be.

There is, however, an important fact which the High Court does not appear to have noticed. It has been seen that the sum paid for the three gundas was Rs. 560. Srimati in her deposition said that the income of the property purchased by her at the auction sale would be Rs. 700 or 800 a year, exclusive of the sudder rent. The defendants put in evidence an attested copy of a bond, dated the 21st of February 1855, by which Srimati mortgaged to Shib Dyal Tewari one gunda out of the three for a loan of Rs. 4,500, stated to be taken by Goluck Nath and herself. This would give to the three gundas at that time a mortgage value of Rs. 13,500. It appears to their Lordships that this mortgage is also some evidence that Goluck Nath was the real owner.

On the 30th March 1855 Shib Dyal Tewari obtained a decree upon this bond against Goluck Nath and Srimati for Rs. 4,936 for principal, interest, and costs. On the 12th of November 1859, Srimati executed a mookhtarnama, in which it is stated that having received Rs. 7,795, inclusive of costs and interest due to Shib Dyal Tewari on this decree, and Rs. 26,205 in cash for payment of the debts of other creditors, she appointed her son,

Hurro Coomar Chowdhry, mookhtar, on her behalf for the purpose of granting a temporary ijara, together with her husband, to the said Tewari, of her three gundas, and three out of the six obtained by her husband by right of inheritance from his uncle, Gopinath Chowdhry, at an annual rental of Rs. 1,760 14 annas. This shows a value of the three gundas slightly in excess of that before given. The ijara was executed accordingly, and is dated the 16th December 1859, there being to it a schedule of nankar lands which were excluded from it. There is no evidence what the debts of other creditors were, whether of Goluck Nath or of Srimati. Their Lordships think it is improbable that if Srimati had become the owner of the three gundas as her *stridhan*, and had incurred debts which had to be paid by borrowing money, she would not have made a separate mortgage of her three gundas. If she were not a benamidar the transaction is a singular one; if she were, it is explicable. It seems more probable that the debts were Goluck Nath's, and Srimati joined in the mortgage because she was the apparent owner. The difference between the price paid for the three gundas in 1842 and the value is very significant. There is no evidence of what happened at the sale, what biddings there were, or how the property came to be sold for so small a sum. It appears to their Lordships incredible that Goluck Nath allowed this, which was a fourth of the ancestral property he then had, to be purchased by his wife on her own account, and to become her *stridhan*, with the incidents belonging to such property.

As to the evidence of possession, the registry of Srimati's name, whenever it took place, is of no value, as it would follow the sale certificate; and rent suits would be properly brought in her name jointly with Goluck Nath, as was done in the suit, the decree in which is in the record. The witnesses to possession cannot be relied upon. The Subordinate Judge said that the evidence of some of the defendant's witnesses with regard to this was clearly tutored and false, and the High Court say they think there is as good evidence on one side as on the other.

It was argued for the respondents that the appellant claimed to be registered for the first time in February 1878, and that he might have taken proceedings with regard

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to the nankar lands before then. It does not appear that he could have been registered separately for those lands. The point was not taken in the lower Courts, where an explanation of his not doing so might have been given. As to the six gundas included in the ijara, it is clear, from the judgment of the Deputy Collector before noticed, that a claim to be registered in respect of those would have been unsuccessful. In fact, the appellant did not, in February 1878, claim to be registered. He only objected that Srimati was not entitled to registration. She admitted in her evidence that he was in possession of the other six gundas, but whether his name had been registered in respect of them did not appear.

Their Lordships have not been unmindful that this is an inquiry into the nature of a transaction which took place so far back as 1842, but until the appellant's purchase no occasion had arisen for the inquiry. There was not any opposition of interests between Goluck Nath and his wife, and the appellant brought his suit without substantial delay after he found his title challenged. Moreover, though some evidence has been lost which might have been material, there still exists one of the co-sureties, and what is more important Srimati herself was living, who, if her story be true, was the leading actor in the acquisition of the property by herself.

Their Lordships have to decide between the conflicting decisions of the lower Courts on a question of fact. They think the reasons given by the High Court for its decision are not satisfactory, and their consideration of the evidence in the case has brought them to the same conclusion as the Subordinate Judge. They will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to decree that the appeal to that Court be dismissed with costs. The respondent will pay the costs of this appeal.

Appeal allowed with costs.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Agnew.

BENI RAM BHUTT AND OTHERS (PLAINTIFFS) *v.* RAM LAL DHUKRI AND OTHERS (DEFENDANTS.)*

1886 *March* 30.

Minor, Suit by—Minority, Objection on the ground of—Remand—Rejection of plaint—Civil Procedure Code, ss. 2, 53, 54, 422—*Decree, What it includes.*

Section 442 of the Civil Procedure Code refers to a case where the plaint on the face of it appears to have been filed by a person who was a minor.

Where in a suit the plaintiffs described themselves as adults, and on the objection of the defendants an issue was raised and inquired into on the question of age:

Held, that the order passed under the circumstances, although it professed to have been made under s. 442 of the Procedure Code, must be treated as one rejecting the plaint or dismissing the suit, on the ground that the suit was instituted by persons who were established on the evidence to be minors, and was appealable as a decree within the meaning of s. 2 of the Code.

The words, "rejecting the plaint," in s. 2, are not limited to the cases provided for in ss. 53, 54.

Held, also, that the defendant, not having taken an objection to the suit on the ground of the minority of the plaintiffs, whilst it was pending in appeal to the High Court, were precluded from raising it on remand.

THIS suit was instituted in the month of June 1880 by the four plaintiffs who are brothers, *viz.*, Beni Ram Bhutt, Krishna Ram Bhutt, Hurry Ram Bhutt and Mohun Ram Bhutt. The first two plaintiffs brought the suit on their own behalf as adults, and the last two plaintiffs, who were said to be minors, by their next friend, their eldest brother Beni Ram Bhutt. The written statements in the suit were filed in September 1880, and in these written statements it was stated that all the plaintiffs were minors. In the month of March 1881 the issues were framed, and the second issue was "whether the plaintiffs Nos. 1 and 2 were majors or not." The suit was ultimately dismissed by the lower Court on the 20th of May 1881 on the

*Appeal from Original Decree No. 277 of 1884, against the decree of Baboo Kali Prosunno Mookerjee, Rai Bahadoor, Subordinate Judge of Gya, dated the 6th of August 1884.

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ground that no evidence was given by the plaintiffs in the case. An appeal was preferred against that judgment, and on the 30th April 1883 the High Court remanded the case in order to allow the plaintiffs an opportunity of adducing evidence. On the case going back an application was made by the plaintiff No. 1 to be allowed to represent the minor plaintiffs as their next friend. That application was granted by an order dated 30th July 1884. Then evidence was taken, and after the plaintiffs had closed their case, the Subordinate Judge decided the suit upon the ground that all the four plaintiffs were minors at the time of its institution, and upon that ground directed the plaint to be taken off the file under s. 442 of the Code of Civil Procedure, awarding a decree for the costs incurred by the defendants against one Gopal Lal, who was the mookhtar, who appointed the vakeel by whom the plaint was filed.

Against this order an appeal was filed to the High Court.

Baboo *Saligram Singh* and Baboo *Jogendra Chunder Ghose* for the appellants.

Mr. *Twidale* for the respondents.

The judgment of the Court (MITTER and AGNEW, JJ.) was as follows :—

(Their Lordships, after stating the facts as above, proceeded) :— It is contended on behalf of the respondents that no appeal lies against an order passed under s. 442, but we are of opinion that although the Subordinate Judge says that the order in question was passed by him under s. 442, it was not really an order under that section. Section 442 is to the following effect: "If a plaint be filed by or on behalf of a minor without a next friend the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. Notice of such application shall be given to such person by the defendant; and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit." That section refers to a case where, on the face of the plaint, it appears that it was filed by a person who was a minor. It does not contemplate any enquiry into the question of minority as in this case, where it is brought by persons professing them-

selves to be adults, and where the defendant objects to the suit on the ground that they are not adults but minors, and where, upon these conflicting allegations, an issue is raised for trial. In a case like this the order of the Court, if it finds that the defendants' allegation is correct, is not passed under s. 442. A case of this nature is not expressly provided for in the Procedure Code, but there are decided cases which show that in a case of this nature the former practice which, not being abrogated by the present Code, must be considered to be in force, was to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a next friend; but be that as it may, the order which has been passed in this case does not appear to us to be an order under s. 442. It is therefore not necessary for us to decide the question whether an order under s. 442 is appealable. The present order, although it professes to have been passed under s. 442, must be an order rejecting the plaint or dismissing the suit on the ground that the suit was instituted by persons who were established on the evidence to be minors. Whether considered as an order rejecting the plaint or dismissing the suit, it would be appealable because it comes within the meaning of the word *decree* as given in s. 2 of the Civil Procedure Code, and there is no reason why the words *rejecting the plaint* used in s. 2 should be limited to the cases provided for in ss. 53 and 54. We are of opinion that the preliminary objection taken before us must be over-ruled. Then, as regards the merits of the appeal, it seems to us that, even if we were inclined to agree with the lower Court that all the plaintiffs were minors at the time when the suit was instituted, still we should have held that the lower Court was not justified in dismissing the suit upon that ground. We have already referred to the practice that prevailed before the new Code of Procedure was passed, and we have already said that that practice has not been abrogated by any provision in the Civil Procedure Code. But in this case, taking the finding of the lower Court to be correct, yet, at the time when the trial took place, the plaintiff No. 1 was admittedly of age, and therefore it would have been unnecessary to suspend proceedings in order to allow him to appear by a next

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friend. In fact, being an adult, he was competent to proceed with the suit himself. Furthermore, we have referred already to the order of the 30th of July 1884, by which the plaintiff No. 1 was appointed next friend to the two minor plaintiffs. At that time he was of age, and we are at a loss to understand how, in the face of that order, the lower Court dismissed the whole suit upon the ground that all the four plaintiffs were minors at the time of the institution of the suit. So far as the plaintiffs Nos. 3 and 4, who were then admittedly minors, and who are now admittedly minors, are concerned, the suit was not liable to be dismissed, because they were represented by their eldest brother and next friend appointed by an order of the Court. We further find that, when the appeal was preferred to this Court by the plaintiffs, and on that appeal the Court directed the lower Court to allow them to adduce their evidence, no objection was taken by the respondents on the score of their minority. That being so, we are of opinion that they were precluded from relying upon that objection in the lower Court when the case was remanded to that Court for trial. If it were necessary to express any opinion upon the evidence given in the Court below, we should be inclined to hold that the conclusion to which the lower Court has come upon that evidence is not correct. The mother of the plaintiffs deposes that the plaintiff No. 1 was, at the time her deposition was taken, 23 years of age, and the Judge rejects this evidence, although it was supported by a horoscope filed and proved, upon the ground that it was the uncorroborated testimony of a single witness. He says, referring to the evidence of the mother: "The evidence of Munni Bohu, the mother of the plaintiffs, would indeed show the age of these persons to be more than what the other witnesses have stated; but the uncorroborated testimony of a single witness, especially when rebutted by the evidence on the same side, cannot be relied upon. Munni Bohu indeed is the mother of the plaintiff, but that is no reason why her testimony should be relied upon, when it is contradicted by the other evidence adduced on the plaintiffs' side." The other evidence to which the Subordinate Judge refers is merely the loose statements of some witnesses as to the ages of the

respective plaintiffs, and from their testimony it is quite clear that they could not speak with any degree of precision as to the ages of the plaintiffs. It is a matter of some surprise to find the Subordinate Judge saying that, because Munni Bohu is the mother of the plaintiffs, her testimony is not to be relied upon. A mother's evidence would be the best evidence upon the question of the age of her sons, especially when that testimony is supported by the evidence of a horoscope which has been produced and proved by a competent witness. The Subordinate Judge should have accepted that evidence as fully trustworthy.

Upon these grounds we think that the decision of the lower Court is erroneous. We set it aside, and as the defendants' evidence has not been taken, the case will be remanded to the lower Court.

Costs will abide the result.

K. M. C. *Case remanded.*

APPEAL FROM ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

J. N. MALCHUS (PLAINTIFF) *v.* BROUGHTON AND ANOTHER (DEFENDANTS).*

1886 *February 27.*

Will, Construction of—Charitable gift—Cy près, Doctrine of—Lapse of Legacy—Costs.

Under the will of *A*, who appointed the Administrator-General of Bengal his executor, *B* had a life interest in the residue of the testator's estate. *B* brought a suit against the Administrator-General to have it declared that a pecuniary legacy, given under the will, had lapsed and fallen into the residue. Prior to the hearing it was agreed between *B* and the Administrator-General that the costs of the suit should come out of the testator's estate; this agreement was embodied in a consent order obtained on the application of the plaintiff. The suit was dismissed, and this decision was affirmed on appeal.

On the question of costs, *held* that the estate of the testator not being before the Court, the agreement as to costs could not be carried out, and that the plaintiff must pay the costs of all parties to the suit.

APPEAL from the decree of Pigot, J., dated the 8th June 1885.

The suit was one brought by the plaintiff, who had a life interest in the residue of the testator's estate, against the Administrator-

* Appeal No. 26 of 1885, against the decree of Mr. Justice Pigot, dated the 8th of June 1885.

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General of Bengal, for the construction of the will of one Nicholas Isaac Malchus, so far as it related to the 5th paragraph of the said will, and for a declaration that a pecuniary legacy given thereunder had lapsed and fallen into the residue.

Prior to the hearing of this suit on the petition of the plaintiff and with the consent of the Administrator-General, the plaint was amended by adding the Venerable Archdeacon Atlay as a party defendant. Embodied in the consent order granting this application was the following: "And it is further ordered that the defendant, the Administrator-General of Bengal, do in any event, out of the estate of the said Nicholas Isaac Malchus, deceased, retain his own costs of and incidental to this suit, to be taxed by the taxing officer of this Court, and pay the costs of all the other parties of and incidental to this suit, to be taxed by the taxing officer of this Court to their respective attorneys."

The facts of the case will be found fully set out in I. L. R., 11 Calc., 591.

The learned Judge in the Court below, after argument, held that the gift in question did not lapse, being a charitable bequest, and that under the circumstances of the case the gift should be construed *cy près*. As regards the question of costs, the learned Judge decided as follows: "The consent order is a binding order, and I cannot modify it. It appears that the plaintiff *ex abundantissimâ cautelâ* has provided that in any case he shall pay the costs of all parties; I observe that the plaintiff asks strangely enough for payment of the costs out of the residuary estate. That does not assist me in construing the order; all I can do is to construe the order strictly, but one thing I do hold, and that is, that it cannot operate upon the charity fund, and that, so far as I can judge, the only portion of the estate of Nicholas Isaac Malchus which was before the Court when that order was made, was that portion of the estate in which the plaintiff was interested. The order is one on the Administrator-General; he must construe it, but it appears to me that I must not, in dealing with the case, abstain from expressing this opinion, and if that construction be correct, the effect is that all the costs due up to decree will be paid by the plaintiff, otherwise I should of course have allowed the Administrator-General his costs out of the accumulations of

the charity fund. I am at liberty to add, though I cannot modify the order, so far as the Administrator-General's costs are concerned, if he be unable to obtain his costs out of that part of the estate which is affected by the order, he be at liberty to apply; that is to say, that the Court may have its hands free to allow his costs out of the charity fund."

The plaintiff appealed on amongst others the following grounds:

(1). "That the St. Paul's School, Calcutta, had ceased to exist at the death of the testator, and that the legacy had therefore lapsed, and had fallen into the residue.

(2). That the bequest was not a general charitable bequest; and that the *cy près* doctrine was inapplicable thereto.

(3). That under the consent order it should have been held that the said bequest of Rs. 7,000 was part of "the estate of the said Nicholas Isaac Malchus, deceased," out of which the costs of all parties in the suit had been agreed to be paid.

Mr. *Kennedy* and Mr. *O'Kinealy* for the appellant.

Mr. *Allen* for the Administrator-General.

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

WILSON, J.—This appeal raises a question as to the construction of the will of one Nicholas Isaac Malchus. The 5th clause of that will says:—

"I direct my executor to invest the sum of Company's Rupees seven thousand in the purchase of Company's Papers and to stand possessed thereof in trust by means of the income of the sum to provide a fund for or towards the education of two or more boys at Saint Paul's School, Calcutta, to be from time to time nominated for that purpose by the trustee for the time being of this my will, such boys to be natives of Calcutta, of poor and indigent parents or fatherless children of Armenian or other Christian religion, and such income to be paid to the Governors, Trustees or Managers of the school for the time being for the purpose of such education, and I direct that no boy shall be eligible for admission to the benefit of this provision at an earlier age than seven or at a later age than twelve, nor shall he continue the enjoyment thereof after

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he shall have attained the age of seventeen, though entitled to its benefit up to then, and whenever a vacancy shall occur either by the removal of any such boy at the age aforesaid, his earlier death or from any other cause, the trustee for the time being of this my will shall fill up the vacancy by appointing some other boy of the character and qualification hereinbefore in that behalf stated, and each boy admitted to the school shall be subject to the government and discipline thereof."

It appears that during the life of the testator St. Paul's School, Calcutta (which was a day school) was closed, and St. Paul's School, Darjeeling, opened in its stead, under the same management and with the aid of the same funds as the older school. The Darjeeling school is a boarding school, and therefore the cost of each pupil is much higher than that of the day scholars in Calcutta.

The plaintiff alleges that by reason of the closing of St. Paul's School, Calcutta, the trust in para. 5th of the will has wholly failed, and that the fund has become part of the residuary estate of the testator. The plaintiff having a life interest in that residuary estate claims the fund accordingly.

We agree with the learned Judge who heard the case that the plaintiff's contention is quite groundless. The trust was not one for St. Paul's School, Calcutta. Had it been so, the question, whether the present school is sufficiently a continuation of the old to receive the gift might have been material. But the trust is for the education of boys to be chosen and sent to the school. If therefore the school has ceased to exist, another mode must be found of giving effect to the governing intention of the testator. If the old Saint Paul's School can be said still to exist it has at any rate so far changed its character, that it would be difficult, if not impossible, to employ the trust funds in sending boys to it, as contemplated by the testator. The inquiry ordered is therefore necessary, and the decree made must stand.

The only other question is as to costs. Under ordinary circumstances the suit would simply have to be dismissed with costs. But there is an agreement embodied in a consent order to which effect must, if possible, be given. It was to the effect that the Administrator-General should retain his own costs, and

pay the costs of all other parties out of the estate of Nicholas Isaac Malchus.

The residuary estate of Nicholas Isaac Malchus is not before the Court, and the order cannot be construed as one dealing with that estate generally. If it were, effect could not be given to it.

We think on the whole the order should be construed as the learned Judge construed it, as an agreement between parties with reference to the residue, so far as they could properly dispose of it by agreement, that is to say, the plaintiff's interest in the residue.

We dismiss the appeal with costs; the costs to be charged as those in the first Court have been.

Appeal dismissed.

Attorney for appellant: Mr. *H. H. Remfry.*

Attorneys for respondent: Baboo *O. C. Gangooly* and Mr. *Carruthers.*

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ASHANULLAH KHAN BAHADUR (PLAINTIFF) *v.* TRILOCHAN BAGCHI AND ANOTHER (DEFENDANTS).*

1886
April 20.

Road Cess Act (Beng. Act IX of 1880), *ss.* 52, 53—*Evidence Act, s.* 114—*Presumption.*

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done.

Held, that the notice provided by s. 52 of the Road Cess Act did not come within the presumption of s. 114, cl. (*e*) of the Evidence Act, and must be proved.

THIS was a suit for the recovery of cesses against four defendants in respect of a lakheraj tenure.

* Appeal from Appellate Decree No. 979 of 1885, against the decree of Baboo Rajendra Coomar Bose, Subordinate Judge of Mymensingh, dated the 16th of February 1885, modifying the decree of Baboo Khettra Prosad Mukherji, Munsiff of Atiah, dated the 26th of June 1884.

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The defendants Nos. 2 and 3, in their written statement, denied holding any portion of the said tenure. The defendant No. 4 admitted that he held a portion of it, but stated that he was not in possession of the rest: he also alleged that the Collector had not assessed any cesses in respect of his lakheraj holding.

The defendant No. 1 did not enter appearance in the Court of first instance.

It appears from the Munsiff's judgment that a single witness was examined on behalf of the plaintiff in support of his claim, and the Munsiff was of opinion that the evidence of that witness was not satisfactory. He says, this witness is a dependant of the plaintiff, and is a man of no position or character. His evidence does not clearly prove that the defendants Nos. 2 and 3 are in possession. He therefore dismissed the suit as against the defendants Nos. 2 and 3, but decreed it as against the defendants Nos. 1 and 4.

Against this decree the defendant No. 4 appealed, and on that appeal the decree against the defendant No. 1 was reversed, and the decree against the defendant No. 4 was modified.

Against the defendant No. 4 a decree was made only at the rate admitted by him. The Subordinate Judge was of opinion that the plaintiff was not entitled to recover road cess from him at the rate stated in the valuation-roll, produced by the plaintiff, of the lakheraj tenure, because it was not shown that any notice under s. 52 of the Road Cess Act had been issued.

The plaintiff appealed to the High Court.

Baboo *Rashbehari Ghose* for the appellant.

Baboo *Shama Churn Chuckerbutty* for the respondents.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J. (who, after stating the facts as above, continued).—It has been contended before us that the lower Appellate Court ought to have presumed under cl. (*e*), s. 114 of the Evidence Act, that the Collector did issue a notice in accordance with the provisions of s. 52.

We are of opinion that cl. (*e*) of s. 114 is not applicable to the present case, and that the lower Appellate Court was right in not making any presumption in favour of the publication of the notice prescribed in s. 52.

Reading ss. 52 and 53 together, it appears to us that the object of the notice prescribed by s. 52 is to inform the tenure-holder, who would be affected by the valuation-roll, of the amount assessed, so that he might come in and object, and have it altered if there be reasonable grounds for such alteration. This appears to be quite clear from s. 53. That being so, it seems to us that the publication of the notice was a condition precedent to the tenure-holder being bound by the valuation-roll prepared by the Collector.

That being so, we are of opinion that no presumption ought to be made under clause (*e*) of s. 114 in favor of the condition precedent having been observed. Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. No presumption can be made in favor of the things prescribed by the Act having been done.

That being so, we are of opinion that the lower Appellate Court was right in holding that the defendant No. 4 is not bound by the valuation-roll prepared by the Collector, because it was not shown that any notice under s. 52 of the Road Cess Act had been duly issued. The appeal as against him must therefore be dismissed with costs.

As regards the defendant No. 1, unless the judgment of the Munsiff proceeded upon a ground common to him and to the defendant No. 4, the Appellate Court would have no power to reverse the decree against him (the defendant No. 1).

In this case, as I have said before, the defendant No. 1 did not enter appearance, and the Munsiff's judgment against the defendant No. 4 proceeded upon his admission that he was in possession of a portion of the tenure mentioned in the plaint. Whatever therefore may have been the ground upon which the decree against the defendant No. 1 was based, it could not have

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been the ground upon which the decree against the defendant No. 4 proceeded, because that was based on his admission, and that was a ground which could not apply to the defendant No. 1, who did not appear before the Munsiff. It is, therefore, clear that the judgment of the Munsiff did not proceed upon a ground common to the defendants Nos. 1 and 4.

That being so, the lower Appellate Court had no power to set aside the decree against the defendant No. 1, on the appeal of defendant No. 4.

We, therefore, set aside the decree of the lower Appellate Court so far as the defendant No. 1 is concerned, and restore the decree of the Munsiff against him with costs.

K. M. C. *Decree modified.*

Before Mr. Justice Mitter and Mr. Justice Grant.

1886 *April* 20.

ARJAN BIBI (PLAINTIFF) *v.* ASGAR ALI CHOWDHURI (DEFENDANT).*

Interest—Bond—Agreement—Penalty—Contract Act, s. 74—Act XXVIII of 1855, *s.* 2.

The stipulation in a bond was in these terms:—"I cannot pay Rs. 1,000 now, so I will pay it within two months and 15 days; if I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month": *Held*, that the stipulation was one for the payment of interest within the meaning of s. 2, Act XXVIII of 1855, and did not fall under s. 74 of the Contract Act.

Mackintosh v. *Crow* (1) approved.

Balkishen Das v. *Run Bahadur Sing* (2) considered.

THIS was a suit for the recovery of a sum of Rs. 2,600 as principal and interest due upon a bond. The bond stipulated that, unless the amount of the debt (Rs. 1,000) was paid within two months and 15 days of the date thereof, interest at the rate of 2 annas per rupee per month should run from the date of the bond. The defendant admitted execution; but pleaded (1) that prior to the institution of the suit he had tendered the money which was refused by the plaintiff's husband and

* Appeal from Appellate Decree No. 2038 of 1885, against the decree of R. H. Greaves, Esq., Judge of Chittagong, dated the 17th of June 1885, modifying the decree of Baboo Jiban Krishna Chatterji, Subordinate Judge of that District, dated the 28th of July 1884.

(1) I. L. R., 9 Calc., 689. (2) I. L. R., 10 Calc., 305.

agent; and (2) that the stipulation for the payment of interest was in the nature of a penal clause.

The Subordinate Judge was of opinion that the rate of interest agreed upon between the parties was not a penal sum, and held that the defendant's plea of tender and refusal had been satisfactorily proved. He accordingly gave the plaintiff a decree for Rs 1,000, the principal amount, and interest as stipulated in the bond up to the date of tender, *i.e.*, Rs. 437-8.

On appeal, the District Judge, relying on the authority of *Bansidhur* v. *Bu Ali Khan* (1), held that the aforesaid clause in the bond stipulating for payment of interest was of a penal character, and in modification of the decree of the lower Court allowed interest at the rate of Rs. 20 per cent. per annum.

The plaintiff appealed to the High Court.

Baboo *Akhil Chandra Sen* for the appellant.

Munshi *Serajul Islam* for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J.—The question for decision in this case is, whether the following stipulation in the bond upon which this suit was brought was a stipulation for the payment of interest or a stipulation which falls under s. 74 of the Contract Act, fixing a particular sum as the amount to be paid in case of a breach.

The stipulation is, "I cannot pay Rs. 1,000 now, so I will pay it within two months and fifteen days. If I do not pay it within that period, I will pay the amount with interest from the date of the bond at the rate of 2 annas per rupee per month."

It seems to us that this stipulation does not fall under s. 74 of the Contract Act. No sum is named here as the amount to be paid by the defendant in case of a breach. It simply stipulates that if the money is not paid within two months and fifteen days the borrower agrees to pay the amount borrowed with interest at the rate of 2 annas per rupee per month. It therefore falls within s. 2 of Act XXVIII of 1855.

The distinction between an agreement to pay interest at a

(1) I. L. R., 3 All., 260.

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certain rate and an agreement to pay a certain sum of money as the amount to be paid in case of breach is stated in a decision of this Court in the case of *Mackintosh* v. *Crow* (1). Mr. Justice Wilson in delivering the judgment of the Court, after examining the various cases bearing upon this point and explaining the nature of the provisions of s. 2 of Act XXVIII of 1855, and s. 74 of the Contract Act, says: "In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term. But where the contract is merely that if the money is not paid at the due date, it shall thenceforth carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due month by month, *i.e.*, as the case may be, for a new consideration. And in my opinion the case falls under the first rule of law abovementioned, not under the second. This view of the law was acted upon by this Court in *Mackintosh* v. *Hunt* (2)."

It is true that in this case the rate of interest stipulated for is to be payable from the date of the loan; but this circumstance does not, in our opinion, take the case out of the purview of s. 2 of Act XXVIII of 1855; because there is only one rate of interest stipulated to be paid here. The bond does not provide for the payment of two rates of interest, one lower and the other higher, the latter being payable under certain circumstances. In this case it cannot be therefore held that a lower rate is the stipulated rate of interest agreed to be paid by the debtor under s. 2, Act XXVIII of 1855, and that a higher rate is named in order to determine the amount of compensation to be paid under s. 74 of the Contract Act in case of a breach. The agreement in this case is that no interest would be payable if the money covered by the bond be paid within the time mentioned in it, but if it be not paid within that time, interest at the

(1) I. L. R., 9 Calc., 689. (2) I. L. R., 2, Calc., 202.

rate of 2 annas per rupee *per mensem* would be payable. This agreement falls, in our opinion, under s. 2 of Act XXVIII of 1855.

We may point out here that the authority of the cases in which a higher rate of interest has been considered to be in the nature of a penalty has been much shaken by the decision of the Judicial Committee of the Privy Council in *Balkishen* v. *Run Bahadur Singh* (1). In that case a solenamah provided for the payment of six per cent. interest upon the money payable under it, but under certain circumstances the rate was to be doubled. Their Lordships observed: "They do not concur with the High Court that the payment of a double rate of interest was in the nature of a penalty. The solenamah was an agreement fixing the rate of interest, which was to be at the rate of 6 per cent. under certain circumstances, and 12 per cent. under others."

We are therefore of opinion that the lower Appellate Court is wrong in disallowing the stipulated rate of interest. We set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs.

K. M. C. *Appeal decreed.*

Before Mr. Justice Mitter and Mr. Justice Grant.

RAM KISHORE GANGOPADHYA (ONE OF THE DEFENDANTS) *v.* BANDIKARATAN TEWARI CHOWDHRY (PLAINTIFF).*

1886
April 15.

Limitation Act, 1877, *Art.* 144—*Suit for possession.*

On the 7th December 1863, *A* in execution of his decree purchased and obtained symbolical possession of a certain 4-annas share, the property of his judgment-debtor. The 4-annas share was at the time under a mortgage to *B*, who happened to be in possession of the share as lessee. The term of the lease expired in 1870 or 1871. *A*, *C* and *D*, who were members of a Hindu joint family, afterwards came to a partition of their common estate in which was included the 4-annas share, and one of them, *D*, sold his share in the 4-annas to *B*, who, on the

* Appeal from Order No. 374 of 1885, against the order of Baboo Rajendra Coomar Bose, Subordinate Judge of Mymensingh, dated the 18th of July 1885, reversing the order of Baboo Shumbhu Chandra Nag, Munsiff of Issurgunge, dated the 26th of March 1885.

(1) I. L. R., 10 Calc., 305.

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22nd December 1871, purchased it in the name of *E*. *B* then brought a suit to enforce his mortgage against *F*, the heir of his mortgagor, and on the 8th December 1873 obtained a decree which on special appeal was confirmed by the High Court on the 21st December 1875. On the 6th December 1875 *A*, *C* and *K* had brought a suit for the possession of the 4-annas share against one Mukund Kishore, who had wrongfully taken possession of the property in 1870 or 1871, soon after the expiration of the lease to *B*. The suit was finally decided in their favor on the 29th July 1879. In the meantime, that is somewhere in 1876, *B* had contrived to take possession of the whole share. In 1883 symbolical possession was obtained under the decree of the 29th July. *B* then executed his mortgage decree, and attached the 4-annas share, excluding the portion which stood in the name of his benamidar. *Z*, the heir of *A*, having failed to make good his claim to a share of the property in the execution proceedings, now brought a suit for possession against *B* on the 19th July 1884.

Held, that the suit, having been brought within twelve years from the date of the fraudulent possession by *B*, was in time, and fell under Art 144 of the Limitation Act.

THE facts of this case, so far as they are material on the issue of limitation, are these :—

One Bhubanmoyee was the owner of a 4-annas share of the property in dispute. Shibdoyal Tewari, the grandfather of the plaintiff, obtained a decree against her, and, on the 7th December 1863, in execution of that decrée, purchased the said share and obtained symbolical possession of it on the 28th December 1870.

It appears that on the 4th March 1863, the defendant No. 1 had advanced a sum of Rs. 600 to Bhubanmoyee and Tripura Sundari on a bond in which the said 4-annas share was hypothecated to him. It also appears that some arrangement was come to between the parties to this transaction, under which the 4-annas share was left in the possession of the mortgagee, as lessee, from the year 1270 to the year 1277; and it has been found in this case that at the time when possession was being made over to Shibdoyal under his purchase, the property was in the possession of the mortgagee, the defendant No. 1.

Shibdoyal was a member of a joint Hindu family, the other members of which were Jadu Nath and Biswa Nath. There was a partition amongst the members, and under that partition, a 1-anna 5-gundas share was allotted to Shibdoyal, a 1-anna share

to Jadu Nath, and a 1-anna 15-gundas share to Biswa Nath. It appears that a decree was passed against Biswa Nath, in execution of which, the defendant No. 1, on the 22nd December 1871, purchased Biswa Nath's interest in the property in the benami of one Kali Kishore.

After the death of Bhubanmoyee, the defendant No. 1 brought a suit against one Debendra Kishore Acharji, as representing Bhubanmoyee's interest in the property, to enforce his mortgage. In that suit one Mukunda Kishore Acharji intervened, alleging that he had purchased the property as the property of Tripura Sundari. It may be stated here that, upon the findings of the lower Appellate Court, it is clear that Tripura Sundari had no interest in this property, and that the person who was entitled to it was Bhubanmoyee.

On the 28th November 1883, the suit of the defendant No. 1 was decreed in his favor, and that decree was confirmed by this Court in special appeal on 21st December 1875. But intermediately, that is, on the 6th December 1875, a suit was brought by Shibdoyal, Jadu Nath, and Kali Kishore, the benamdar of the defendant No. 1, against Makunda Kishore to obtain possession of the whole 4-annas share, alleging that Makunda Kishore had ousted them in Bysack 1278, that is to say, on the expiry of the lease to defendant No. 1 which expired at the end of 1277.

It has been found by the lower Appellate Court that, whilst this latter case was pending in appeal below, the defendant took possession of the whole 4-annas share, but eventually the High Court, on the 28th July 1879, confirmed the decree of the lower Court which was in favor of the plaintiffs in that suit, and in execution of that decree, symbolical possession was taken in 1290, corresponding to 1883.

It appears that the defendant No. 1 then executed the mortgage decree which he had obtained against Debendra Kishore Acharji, and attached a 2-annas 15-gundas share of the property, excluding, of course, the 1-anna 15-gundas share of Biswa Nath which he had purchased in the benami of Kali Kishore. The present plaintiff, who is the grandson of Shibdoyal, to whom a 1-anna 5-gundas share was allotted on the partition of the family

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property, preferred a claim to the said share; that claim was rejected, and the property was ordered to be sold. The present suit was brought for possession on the 19th of July 1884.

The Court of first instance held that the claim was barred by limitation. The lower Appellate Court was of a contrary opinion, and it remanded the case to the first Court to take an account of the profits enjoyed by the appellant during his possession.

Against this decision, the defendant No. 1 preferred a second appeal, while the plaintiff objected to that part of the judgment which directed an account to be taken.

Baboo *Jogesh Chunder Roy* for the appellant.

Baboo *Dwarika Nath Chakravati* for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was delivered by

MITTER, J. (who, after stating the facts as above, continued).—The question of limitation must depend upon the question as to which Article of the Limitation Act is applicable to the present case. Having regard to the facts found by the lower Appellate Court, it is clear that Arts. 137 and 138 are not applicable, because at the time of Shibdoyal's auction purchase, the judgment-debtor was in possession, and Art. 138 is not applicable, because upon the finding of the lower Appellate Court, the purchaser, Shibdoyal, obtained possession through the lessee who was in possession at that time. Arts. 139, 140, 141 and 143 have evidently nothing to do with the present case. Therefore either Art. 142 or 144 must be applicable.

If Art. 142 were applicable, the plaintiffs' suit would of course be barred, because the date of dispossession or discontinuance of possession must under any circumstances have been in the year 1278 or 1871, and the suit having been brought in 1884 it would have been barred. But it appears to us that this Article is not applicable to the peculiar facts of this case. There was no doubt a dispossession which gave the plaintiff a cause of action. That dispossession was in the year 1871, when, on the expiration of the lease at the end of 1277, wrongful possession was taken by Makunda Kishore, and upon that dispossession

a suit was brought by the plaintiffs' predecessor in title, Shibdoyal, and also by his co-sharer Jadu Nath, and the defendant No. 1, who is setting up the plea of limitation because in that suit his benamdar, Kali Kishore, was one of the plaintiffs. Therefore the suit contemplated by Art. 142, having regard to the facts of this case, was brought and was decreed. But while that suit was pending in the first Appellate Court, the defendant No. 1, who was one of the plaintiffs in that suit, alone took wrongful possession of the property. A suit against him therefore would not under these circumstances have been a suit under Art. 142, because the dispossession which gave rise to the cause of action led to the suit which was instituted on 6th December 1875, and that was a suit which, upon the facts found in this case, was brought under Art. 142.

The present suit therefore not coming under Art. 142, it must come under Art. 144, which is in these general terms:— "Possession of immoveable property or any interest therein not hereby specially provided for." The lower Appellate Court was therefore right in over-ruling the plea of limitation, because the adverse possession of defendant No. 1 commenced when he fraudulently took possession of the property in dispute in the year 1283, while he and his co-plaintiffs were prosecuting the suit which they had brought upon the dispossession by Makunda Kishore in the first Appellate Court. The appeal of the defendant No. 1 therefore fails.

As regards the objection taken by the plaintiff, we think that it is valid. Under the mortgage set up by the defendant No. 1, he has no right to the possession of the property. His right is simply to enforce that mortgage by the sale of the mortgaged property in execution of decree. He is therefore not entitled to retain possession of the property. If he has any remedy in respect of his mortgage, this decree will not in any way prejudice that right. If he has a right he may enforce it still by a separate suit, but under the mortgage he is not entitled to retain possession of the property.

That being so, the lower Appellate Court was not right in remanding the case in order that an account might be taken.

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The proper decree, upon the findings of the lower Appellate Court, would have been a decree for possession.

We accordingly modify the decree of the lower Appellate Court, and direct that a decree be made in favor of the plaintiff for possession of the property in dispute.

The plaintiff will recover wasilat under s. 211 of the Code of Civil Procedure from the date of the institution of the suit until delivery of possession or until the expiration of three years from this date, whichever event first occurs, with interest thereupon at six per cent. from date of ascertainment. The plaintiff will have his costs in all the Courts from the defendant.

K. M. C. *Decree modified.*

Before Mr. Justice Wilson and Mr. Justice Porter.

1886 *June* 9.

RAM NARAIN KOER AND OTHERS (DEFENDANTS) *v.* MAHABIR PERSHAD SINGH AND ANOTHER (PLAINTIFFS) AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).

Public Demands Recovery Act (Beng. Act VII of 1880), *ss.* 10, 23—*Attachment under certificate procedure—"Estate," Meaning of—Act XI of* 1859, *ss.* 5, 6—*Notification of Sale, Specification of.*

The certificate and notice referred to in s. 10, Beng. Act VII of 1880, are executive acts, and an attachment, which is the result of those acts, is not a judicial, but an executive proceeding.

The meaning of s. 23 of that Act, which lays down that a Collector "in the discharge of his functions shall be deemed to be a person acting judicially within the meaning of Act XVIII of 1850," is, that for the purpose of protecting him from personal liability his action is to be regarded as judicial.

Under s. 6 of Act XI of 1859, it is not necessary that a notification should specify the owners of an estate or the owners of shares in the estate. *Secretary of State, &c.* v. *Rashbehary Mookerjee* (1) followed.

All that is necessary under that section is that the notification should specify the estate or shares in the estate to be sold, and in selling a share in an estate it is unnecessary to specify the shares or mouzahs of which that share is composed.

* Appeals from Original Decrees Nos. 358—360 of 1885, against the decrees of Baboo Matadin, Rai Bahadoor, Subordinate Judge of Chupra, dated the 25th of April 1885.

(1) I. L. R., 9 Calc., 591.

The word "estate," as there used, ordinarily means "mehal;" but the term also applies to a portion of a mehal with regard to which a separate account has been opened, but not to an undivided portion of a mehal as to which separate accounts are not kept.

THIS was a suit brought to set aside a sale of Mehal Roypatti, held for arrears of Government revenue, on the 6th January 1883, at which the mehal was purchased by the defendants Nos. 1 to 5.

The facts were that Mehal Roypatti consisted of two *kalams* under a *butwara* partition, the one bearing the Towzi No. 3142 consisting of eight *kalams;* in all of which the plaintiffs held a share, one of the other shareholders in these *kalams,* who held a share equal to the share of the plaintiffs, having opened a separate account with the Collector for payment of his share of the revenue; the remainder of the *pattis* being joint.

The other *kalam* of Mehal Roypatti, bearing the Towzi No. 3143, consisted of seventeen minor *kalams,* and in this both the plaintiffs and their co-sharers had opened separate accounts for payment of revenue.

On the 28th September 1882, which was the last day for payment of Government revenue, at the beginning of the day, the Government revenue in respect of Towzi No. 3142 was in arrear. On that day the plaintiffs paid in a sum in respect of Towzi No. 3142, which in amount, however, fell short of the arrear due.

On the same day there was also an arrear in respect of the plaintiffs' separate account in Towzi No. 3143, which at the beginning of the day amounted to Rs. 240. During that day the plaintiffs paid in Rs. 220; and at a later hour the same day paid in a further sum of Rs. 20. It appeared, however, that the plaintiffs' co-sharers had in respect of Towzi No. 3143 paid in more than their proper shares of revenue, so that, although there was a deficiency as regards the plaintiffs' separate account in Towzi No. 3143 without reckoning the Rs. 20 paid, still there would have been a credit balance in respect of the whole mehal.

As regards this part of the case the plaintiffs asserted that, on the 28th September 1882, there was no arrear due on account of the estate Towzi No. 3143, and that the Rs. 20 had been deposited on account of the arrears due for Towzi No. 3142.

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They further alleged that the sale was held in an irregular manner; that the notifications under ss. 6 and 7 of Act XI of 1859 were not duly made, the shares in the estate not having been specified; that the correct name of the proprietor and the necessary particulars were not mentioned in the sale notification, the name of a person long since dead alone being mentioned; and that in consequence of these irregularities the sale was made at an inadequate price. Also that the Mehal sold was at the time of the sale under attachment for arrears of road cess, and that such an attachment was similar to and had the effect of an attachment by a Civil Court, and that a notice under s. 5 of Act XI of 1859 was necessary; that even if it were not so, the sale could not be held under s. 17 of Act XI of 1859. That the plaintiffs were minors at the date of the sale; that their estate was in the hands of the Court of Wards till July 1881; that the Collector gave up charge without making the estate over to their guardians; that it was not till February 1884 that their mother took out a certificate of guardianship and took over the management of the estate; that therefore the period to which the arrears related, and at which the sale was held, was one during which there was nobody on behalf of the minors managing the estate; that the Collector not having made over the estate to any body, the estate should be considered to have been under the charge of the Court of Wards.

The defendants Nos. 1 to 5 and the Secretary of State contended that the Rs. 20 was deposited on account of estate Towzi No. 3143, and denied all the other allegations made by the plaintiffs.

The Subordinate Judge found that the documents put in proved that the Rs. 20 was deposited on account of the estate Towzi No. 3143, and that there was an arrear due on account of Towzi No. 3142: that the notifications were duly served; but that the particulars required by s. 6 of Act XI of 1859 had not been complied with, inasmuch as no specification was given in the notification of the share belonging to the defaulter, or of the different *kalams* in the mehal, nor was the name of the recorded proprietor given; nor any statement made of the shares concerning which separate accounts had been opened as directed by s. 13 of Act XI of 1859.

He further found that the mehal sold was at the time under attachment for arrears of road cess, and held that such an attachment was similar to and had the effect of an attachment by a Civil Court, and was an act done by the Collector in a judicial capacity; that therefore a notice under s. 5 of Act XI was indispensable; and no notice having been given, the sale was illegal. That the estate of the plaintiffs after having been given up by the Court of Wards under s. 8 of Beng. Act IV of 1870, had immediately been taken charge of by their mother, who had collected the rents and had paid Government revenue.

He further held that the sale had been made at a very inadequate price, and that inasmuch as the sale had been made illegally, the inadequacy of the price was prejudicial to the plaintiffs.

He therefore set aside the sale.

The auction purchasers, defendants Nos. 1 to 5, appealed to the High Court.

Mr. *Evans*, Baboo *Unnoda Pershad Banerjee*, Baboo *Mohesh Chunder Chowdhry* and Mr. *C. Gregory* for the appellants.

Baboo *Hem Chunder Banerjee*, Moulvi *Mahomed Yusoof* and Baboo *Saligram Singh* for the respondents.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

The present suit is brought by the plaintiffs, who are the owners of a share of the property known as Mehal Roypatti, to set aside a sale for arrears of Government revenue which took place on the 6th of January 1883. A number of points have been raised which must be considered separately.

The point which it will be convenient to consider first is this: It is said that there was no authority to sell at all, because there was no arrear in the Government revenue. Of-course, if that were so, the sale would be absolutely and totally void. The way it is sought to make out this point is this: There were two mehals, one numbered 3142, and the other 3143. The present plaintiffs were shareholders in each of those mehals. In mehal 3142, there were a number of other shareholders, one of whom had obtained from the Collector the

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opening of a separate account of revenue in respect of his own share. In mehal 3143 there were also a number of shareholders, and no less than fifteen separate accounts of revenue had been opened in respect of the shares of the different shareholders. On the day fixed for the payment of arrears of Government revenue, before sunset, the 20th September 1882, at the beginning of the day, the Government revenue in respect of mehal 3142 was in arrear. A sum of money, but a sum short of the requisite amount, was paid by the present plaintiffs on that day, undoubtedly in respect of this mehal. There was also an arrear on that same day in respect of the present plaintiffs' separate account of revenue for mehal 3143; and that arrear at the beginning of that day amounted to Rs. 240. On that day they paid in Rs. 220 in one sum in respect of mehal 3143. On the same day they paid in another sum of Rs. 20. In all the documents relating to the transaction that sum of Rs. 20 appears as paid in respect of mehal 3143; but it also appears that the other shareholders had paid in more than their proper proportion of revenue. So without reckoning the Rs. 20 which were paid in on that day by the plaintiffs, although there would have been a deficiency on the present plaintiffs' separate account, there would not have been a deficiency, but a credit balance, in respect of the whole mehal. The plaintiffs say that they did not really pay those Rs. 20 in respect of mehal 3143, but that they paid that sum in respect of mehal 3142. That point the lower Court has found against them.

The Collectorate documents are clear on this point; and again it is quite clear that *that* sum of Rs. 20 was the precise sum, which, at the moment it was paid in, was necessary to clear off the arrear on the plaintiffs' separate account in respect of mehal 3143. These two circumstances afford very strong proof that it was in respect of mehal 3143, and not in respect of mehal 3142, that the plaintiffs paid the Rs. 20. We think therefore that the lower Court was quite right in rejecting the plaintiffs' evidence, that the Rs. 20 were really paid in respect of mehal 3142. It follows from that, that there was an arrear at sunset of that day in respect of mehal 3142. The first point therefore fails.

The next point relates to a contention based on s. 5 of the Revenue Sale Act (XI of 1859). Section 5 says that no estate, and no share or interest in an estate, shall be sold for the recovery of arrears otherwise than after a notification shall have been affixed in certain places for a period not less than fifteen clear days preceding the date fixed for payment, in certain cases: *first*, where the arrears are other than those of the current year, or of the year immediately preceding; *second*, where the arrears are due in respect of an estate other than the estate to be sold; *third*, where the arrears are those of an estate under attachment by order of any judicial authority, or managed by the Collector in accordance with such order.

It is said that in this case the sale proceedings were void, because the property, on the day fixed for payment and fifteen days before, was under attachment by order of a judicial authority.

It is not necessary for us to consider what the legal consequence would be if the case had fallen within s. 5, all the proceedings prescribed not having been taken. We think that the case does not fall within that section. It is said that the property was under attachment by order of a judicial authority because a certificate proceeding for the recovery of arrears of road cess had been taken, and a certificate had been made, and a notice as prescribed by s. 10, Beng. Act VII of 1880 had been issued and, as contended for by the plaintiffs, served.

We think that this contention fails for two reasons: *first*, the notice which is referred to does not amount to an attachment by order of a judicial authority. Bengal Act VII of 1880, which, by its terms, is incorporated with the two earlier Acts upon the like subject, provides for certificates in various cases. In s. 5 for a certificate of the balance left due after a revenue sale; in s. 7 for a certificate of debts due and payable to the Collector in a variety of cases; and in s. 9 for a certificate in cases of Government debts payable to persons other than the Collector, or in cases of debts due to managers on behalf of the Court of Wards. In each of these cases the certificate is given the effect of a decree for the purpose of execution. We then come to s. 10. That section says that, when a certificate in any of

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the cases I have referred to "shall have been filed, the Collector shall issue to the judgment-debtor a copy of such certificate and a notice in Form 4 in the second schedule annexed to this Act;" and "from and after the service of such notice, such certificate shall bind all immoveable property of such judgment-debtor situate within the jurisdiction of such Collector in the same manner and with like effect as if such immoveable property had been attached under the provisions of s. 274 of the Civil Procedure Code." In other words, when once a certificate is filed, then notice is to issue. The notice is a notice informing the person concerned that a certificate has been filed; that if he denies his liability he must show cause why the certificate should not be executed; that if he does not show cause it will be executed; and it prohibits him from alienating his property. When that notice is served the certificate is to bind immoveable property to the same extent as if it were an attachment issued under s. 274 of the Code of Civil Procedure.

The certificate procedure in its very nature is clearly not a judicial procedure. There is no examining of the parties. There is no giving to any of them an opportunity to be heard. It is clearly an executive act, and that is what it is intended to be. The certificate and notice are clearly not judicial but executive acts. *Primâ facie*, therefore, the attachment, which is the result of those acts, is not a judicial but an executive proceeding. Then when we look at s. 23 we find that the Collector, in the discharge of his functions under Beng. Act VII of 1880, is to be "deemed to be a person acting judicially within the meaning of Act XVIII of 1850," that is, for the purpose of protecting him from personal liability his action is to be regarded as judicial. For these reasons we think that the attachment is not a judicial attachment.

In the next place, if it were a judicial attachment, it would be necessary for the present plaintiffs, who rely upon it, to show that at the time in question there was an actual valid attachment of this nature in force. This is not the case of a person who has in ignorance acquired a title upon which he might rely. It is the case of a defaulting party setting up his own default of payment of road cess and the proceedings taken

against his property in consequence. It is clear, therefore, that he is bound to show that everything was done regularly. What s. 10 directs is that a notice should be served, the contents of which I have described. The mode of serving the notice is prescribed by s. 5 of Beng. Act VII of 1868: "Every notice in and by this Act, or by the said Act XI of 1859, directed to be served, shall be served by delivering to the person to whom it may be directed, a copy thereof attested by the Collector, or by delivering such copy at the usual place of abode of such person, to some adult male member of his family, or, in case it cannot be so served, by posting such copy upon some conspicuous part of the usual or last known place of abode of such person." There was no attempt whatever to serve the notice issued under s. 10 in any of the ways contemplated by s. 5. It was treated as if it were an attachment by which the Collector was to take possession of the property. There was no personal service, and no attempt to serve sale notice at the dwelling place. There was simply a proclamation by the *peadah* of the terms of the notice, and a sticking up of the notice in a conspicuous place. Inasmuch therefore as the notice was not properly served there was no attachment.

The next objection is of a more serious character. It is said that the provisions of s. 6 of Act XI of 1859 have not been complied with, and further that on the authority of the recent Full Bench case of *Lala Mobaruk Lal* v. *The Secretary of State* (1) any defect in the notice under s. 6 is fatal to the whole of the sale proceedings.

It is not necessary for us to consider whether that Full Bench case does or does not go the full length of this contention, because it appears to us that there was no defect in the sale proclamation in this case. Two alleged defects are relied upon: *First*, it is said that the sale proclamation was faulty, because it mentioned as the registered owner a person long since dead and nobody else; and, *secondly*, that it did not sufficiently describe the share of the property to be sold. What it did do was this: It described the serial number. It stated correctly the towzi number. It stated correctly the name of the mehal, and the

(1) I. L. R., 11 Calc., 200.

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pergunnah in which the mehal was situated. Then in the column, "name of proprietor mentioned in the sherista," it gave the name of Ghinu Singh. It may be taken that Ghinu Singh had been the registered proprietor, and that he had long since been dead. This was the ground of the objection founded on the name of the person in the sale proclamation, and it was sought to strengthen the objection by showing that, although the names of the present plaintiffs had not been entered in the register, yet an order had been passed for entering them in the register under the Land Registration Act of 1876. But the words of the section are plain. What is required is that the notice shall specify the estate or the shares in the estate to be sold. It is nowhere said that it is necessary to specify the owners of the estate, or the owners of the shares in the estate. And it has been held by this Court that *that* is the true view of the effect of the section. The point came before this Court in the case of the *Secretary of State* v. *Rashbehari Mukerjee* (1), and it was there held that the omission of the names of some of the recorded proprietors was not a fatal objection under s. 6, the reason being that what the law required was the specification of the estate to be sold, not the specification of the owners of the estate. That case applies to this. Then with regard to the second objection under s. 6, that is, that the estate or share in the estate sold was not sufficiently specified, it is necessary to look at the facts. The mehal in question bears the towzi number, as I have said, 3142. Its name is Mehal Roypatti. Its sudder jumma is Rs. 2,028 odd. One of the shareholders in the estate had before the period in question obtained from the Collector the opening of a separate account of revenue in his name, and the separate jumma assessed upon him in that separate account was Rs. 788 odd, leaving a balance of Rs. 1,240 odd, as the jumma of the non-*ijmali* portion. What the sale notification did was this. It stated correctly the towzi number and the name of the mehal. It cannot therefore be said that it did not specify the estate, because "estate" ordinarily means "mehal." The term "estate" does apply to a portion of a mehal with regard to which a separate account

(1) I. L. R., 9 Calc., 591.

is opened, but it does not apply to an undivided portion of a mehal as to which separate accounts are not kept.

Then it is said that the share in the estate is not specified. What is specified is this: The whole of the sudder jumma is specified. The jumma of the portion in respect of which a separate account was opened is specified, and the jumma of the *ijmali* portion is specified. *Primâ facie*, therefore, the sale notification does specify the share in the estate, because, where a separate account is opened under s. 10 of Act XI of 1859, it is only the jumma that has been separated. Therefore the estate is specified, and as to the thing which has been divided the division is specified But it is said that in this particular case the matter is different, that the division of the jumma does not show the shares in the estate, the shareholders not holding similar shares in all the mouzahs making up the estate. But does that affect the shares of the estate, that is, the shares of the mehal? We think it does not. "Estate" has been defined in Beng. Act VII of 1868. The words of s. 6 point throughout to estates and shares of estates, not to particular properties which make up estates. Then we must remember that the Collector, when he acts under ss. 10 and 11, may or may not know the shares in the mouzahs making up an estate. What is to be stated to him is the shares of the estate, and if the parties do not dispute the shares in that estate as they did not in this case, he assesses the revenue accordingly and opens separate accounts. But in such a case, the Collector has no reason for inquiring what the shares of the parties may be in the mouzahs, if the shares in the mouzahs be different from the shares in the estate. The authorities are to the same effect. In the case of *Amirunnessa Khātoon* v. *The Secretary of State* (1), heard before Garth, C.J., and Macpherson, J., it was held that it was unnecessary to specify in the notification of sale the names of the mouzahs included in the property sought to be sold. If in selling an estate it is unnecessary to specify the mouzahs of which that estate is made up, why should it be necessary, when selling a share in an estate, to specify the shares or mouzahs of which that share is made up?

(1) I. L. R., 10 Calc., 63.

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The objection based on s. 6 therefore fails.

The next objection taken is under s. 5. It is said that the property being under attachment in the way that I have already described was not liable to be sold at all, because, *first*, it was under the management of the Court of Wards. On the evidence it appears to us perfectly clear, as it did to the Court below, that it was not under the management of the Court of Wards.

It is then said that it was not liable to be sold because it was held under attachment by the Revenue authorities by order of a judicial authority. But it is very clear that what that section points to is not an attachment in the sense in which the term is used in the Code of Civil Procedure, but an attachment such as is provided for in the Criminal Procedure Code, which takes the property out of the possession of the ordinary owner and places it into the possession of the Collector. The distinction is pointed out by the Privy Council in the case of *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (1).

For these reasons we are unable to agree with the lower Court in the view which it took with regard to the effect in this case of s. 5 and of s. 6. We agree with the lower Court in all those points in which it decided against the contention of the plaintiffs.

The result is that in our judgment all the objections to the sale fail, that is to say, all the objections which a Court of law can give any effect to.

If, as suggested by the respondents' vakeel before us, this is a case of special hardship to the plaintiffs either from their being infants, or, for any other reason, the Courts of Law have not the power to interfere. If there be any power for such a contention, it is a matter for the consideration of the local Government.

The decision of the lower Court must be set aside, and the suit dismissed with costs in both Courts.

This judgment will govern the other two cases, namely, the appeals from Original Decrees Nos. 359 and 360 of 1885.

Appeal allowed.

T. A. P.

(1) 12 B. L. R., 297.

Before Mr. Justice Wilson and Mr. Justice Porter.

NOWBAT ROY AND OTHERS (DEFENDANTS) *v.* LALA KEDAR NATH (PLAINTIFF).*

1886 *July* 9.

Act XL of 1858, *s.* 3—*Certificate of Guardianship—Certificate ordered, but not issued, Effect of—Limitation.*

A certificate of guardianship, obtained under s. 3 of Act XL of 1858, takes effect from the time it is issued, and not from the date of the order directing its issue.

Sahai Nand v. *Mungniram Marwari* (1) followed.

THIS was a suit brought on the 12th May 1884 by a person who alleged he was adopted on the 13th April 1863, under a deed of authority, dated August 1845, to set aside certain alienations made in 1859 by his adoptive mother. At the date of this alleged adoption the plaintiff was of the age of one year; the adoptive mother died in 1285 F. S., (1878), and thereupon one Lala Topsiram applied to the Court for a certificate of guardianship under Act XL of 1858, and obtained an order appointing him guardian of the minor; this certificate was, however, never issued.

The main question in this suit was whether the suit was barred by limitation, *viz.*, whether the order for the issue of the certificate of guardianship to Lala Topsiram had the effect of deferring the plaintiff's majority to such time as he might attain his twenty-first year; or whether by reason of the abandonment of that order without taking out a certificate thereunder, the plaintiff had attained his majority at eighteen?

The Court of first instance held that as the certificate had never issued, the plaintiff attained his majority at the age of 18 years, and that therefore the suit was barred. The lower Appellate Court held that the order of the Court granting the certificate was sufficient of itself to bring the minor within the provisions of s. 3 of Act IX of 1875, and therefore that the suit

* Appeal from Appellate Order No. 121 of 1886, against the order of H. W. Gordon, Esq., Judge of Chuprah, dated the 29th of December 1885, reversing the order of Baboo Matadin, Subordinate Judge of that district, dated the 30th of December 1884.

(1) I. L. R., 12 Calc., 542.

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was not barred, as the plaintiff would attain his majority at twenty-one; the suit was therefore remanded for re-hearing.

The defendants appealed to the High Court.

Baboo *Umakali Mookerjee* for the appellants contended that the suit was barred; that the effect of the mere order granting the certificate of guardianship under Act XL of 1858 was not of itself sufficient to bring the minor under the provisions of s. 3 of the Majority Act—*Stephen* v. *Stephen* (1).

Moulvi *Mahomed Yusoof* for the respondent contended that the suit was not barred; and cited, as to the effect of the order without issue of the certificate, *Chunee Mul Johurry* v. *Brojo Nath Roy Chowdhry* (2).

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

The only point before us in this appeal is as to the date on which the plaintiff is to be taken to have attained his majority, whether on the completion of his eighteenth or on the completion of his twenty-first year. If a guardian was duly appointed according to law, then under the Majority Act he would not attain his majority until the completion of his twenty-first year. If such appointment of a guardian was not duly made, he would attain his majority on the completion of his eighteenth year.

The fact is, as found, that an application was made for a certicate of guardianship, and an order was passed for the issue of a certificate, but that order was apparently abandoned, and no certificate was ever obtained.

It appears to us that under the Minors' Act it is the certificate which creates the relation of guardian and ward, and that the actual obtaining of the certificate is what is meant by the appointment of a guardian referred to in the Majority Act.

In the case of *Stephen* v. *Stephen* (1) it was held by Sir Richard Garth and Mr. Justice Cunningham, confirming a judgment of the Original Side of this Court, that a certificate of guardianship takes effect not from the date of the order granting it, but from the time the certificate is actually issued. On the other hand, in the case of *Chunee Mul Johurry* v. *Brojo Nath Roy*

(1) I. L. R., 9 Calc., 901. (2) I. L. R., 8 Calc., 967.

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Chowdhry (1) a different view was taken by Field and Macpherson, JJ., who held that the making of the order for, and not the taking out of, the certificate, is that by which a guardian is appointed. On a later occasion the matter came again before another Bench of this Court in the case of *Sahai Nand* v. *Mungniram Marwari* (2), and Tottenham and Norris, JJ., who decided that case, followed the view taken by Garth, C.J. and Cunningham, J., already noticed.

It appears to us therefore that there is a distinct preponderance of authority in this Court in favour of the view that a certificate of guardianship takes effect from the time it is issued—a view, which, in our opinion, is in accordance with the true construction of the statutes themselves.

The result is that the order of remand by the District Judge must be set aside, and that the decree of the first Court must stand.

The appellant will have his costs in this and the lower Appellate Court.

T. A. P. *Appeal allowed.*

Before Mr. Justice Wilson and Mr. Justice Porter.

AGA MAHOMED HAMADANI (PLAINTIFF) *v.* COHEN AND OTHERS (DEFENDANTS).*

1886 *July* 22.

Burma Courts Act (XVII of 1875), *ss.* 49, 97—*Civil Procedure Code Act (XIV of* 1882), *ss.* 3, 4, 540—*Limitation Act (XV of* 1877), *Sch. II, Art.* 156.

An appeal from the Court of the Recorder of Rangoon to the High Court is an appeal under the Civil Procedure Code, and must be made within the time prescribed by Art. 156, Sch. II, of the Limitation Act.

THE plaintiff sued the Directors of the Kamindine Burra Bazar Co., Ld., to recover from them five shares, or the value thereof, in the said Company which shares had become forfeited through failure to pay calls made thereon. The suit was valued

* Appeal from Original Decree No. 269 of 1885, against the decree of Charles John Wilkinson, Esq., Recorder of Rangoon, dated the 1st of December 1882.

(1) I. L. R., 8 Calc., 967. (2) I. L. R., 12 Calc., 542.

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at Rs. 3,070. The defence was that the Directors had not been duly elected, and had no power to make the calls. On the 1st December 1882 the Recorder of Rangoon, before whom the case was heard, dismissed the suit with costs.

The plaintiff appealed to the High Court, presenting his memorandum of appeal on the 18th February 1885. The Deputy Registrar refused to admit the appeal without the sanction of the Court. On the 19th February Garth, C.J., and Wilson, J. admitted the appeal subject to argument at the hearing as to whether the appeal was barred as being presented out of time.

On the appeal coming on for hearing—

Mr. *Pugh* (Mr. *Watkins* with him) appeared for the appellant.

Mr. *Evans* (Mr. *Simmons* with him) appeared for the respondents.

Mr. *Evans* took a preliminary objection that the appeal was out of time.

Mr. *Pugh* contended that the appeal was not one under the Civil Procedure Code, but under the Burma Courts Act, and that therefore, inasmuch as no period of limitation was provided by that Act for appeals to the High Court, Art. 156 of Sch. II of the Limitation Act could not apply.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows :—

We think that this matter is really free from doubt. The question is whether the present appeal, which is an appeal from a decision of the Recorder of Rangoon, was filed within time or out of time ; and that depends upon whether it is, or is not, governed by Art. 156 in the second schedule of the Limitation Act. That article says that an appeal under the Code of Civil Procedure to a High Court, except in certain cases mentioned, must be brought within ninety days from the date of the decree or order appealed against.

What we have to decide is whether an appeal from the Recorder's Court of Rangoon to this Court is an appeal under the Code of Civil Procedure.

The Acts relating to the matter are these :—*First*, the Burma Courts Act (XVII of 1875). That Act provides for the

organization and the jurisdiction of the various Courts therein mentioned. Chapter IV deals with the Court of the Recorder of Rangoon, and s. 49 in that Chapter says: "There shall be no appeal from the decree or order of the Recorder passed in any original suit or proceeding where the amount or value of the subject-matter does not exceed three thousand rupees; but where the amount or value of the suit or proceeding in the Recorder's Court exceeds three thousand rupees, and is less than ten thousand rupees, an appeal shall lie to the High Court." And s. 97 enacts that, "save as otherwise provided by this Act, the Code of Civil Procedure shall be, and shall, on and from the 15th day of April 1872, be deemed to have been in force throughout British Burma." The Code of Civil Procedure in force at that time was Act VIII of 1859. Then we turn to the present Procedure Code, which is in the main identical with the Code of 1877. It applies in general terms to the whole of British India, and therefore includes British Burma. Then s. 3 says, that when in any Act reference is made to Act VIII of 1859, (that is, the Procedure Code of 1859), or Act XXIII of 1861, (that is, the amending Act), or the Code of Civil Procedure, or to Act X of 1877, such reference shall, so far as practicable, be read as applying to this Code, or the corresponding part of it. The consequence of that section is that in the Burma Courts Act we must now read s. 97 as incorporating the present Civil Procedure Code.

Then s. 4 says: "Save as provided in the second paragraph of s. 3 (the paragraph which I have just read), nothing herein contained shall be deemed to affect the following enactments," amongst which is the Burma Courts Act of 1875. The meaning of that kind of saving clause has been very often considered. There is no doubt that the meaning is that, if anything in the Code is found to conflict with anything in the Burma Courts Act, the Code shall not prevail to override the inconsistent provisions in the Burma Courts Act, so far as they are inconsistent.

Then comes s. 540, which says: "Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees or from any part of the

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decrees of the Courts exercising original jurisdiction to the Courts authorised to hear appeals from the decisions of those Courts." That is a general provision not conflicting with any enactment in the Burma Courts Act or any other Act by which an appeal was excluded, because that exclusion is expressly saved, and not prescribing for Burma or any other part of British India to what Court any appeal shall lie, but merely laying down the broad rule that where an appeal is not expressly excluded an appeal shall lie to whatever Court under the enactment in force may be the proper Court. That is the state of the enactments on this matter.

Now, what is meant by an appeal under the Civil Procedure Code ? A particular appeal was given by the Burma Courts Act, and the Burma Courts Act is still the only Act which prescribes to what Court this appeal shall lie. If it had not been given by the Burma Courts Act then s. 540 of the Civil Procedure Code would have been sufficient to give it, provided that some Court was by some enactment provided as the proper Court to hear the appeal. The procedure in appeals in every respect is governed by the Code of Civil Procedure. The Limitation Act, Sch. II, Art. 156, when it speaks of the Civil Procedure Code is, on the face of it, speaking of a Code which relates to procedure, and does not ordinarily deal with substantive rights: and the natural meaning of an appeal under the Civil Procedure Code appears to us to be an appeal governed by the Code of Civil Procedure so far as procedure is concerned.

It appears to us therefore that this appeal is clearly out of time, and must be rejected on that ground. The respondent is entitled to his costs.

Since this case was heard our attention has been called to the case of *Mahomed Hossein* v. *Inodeen* (1). That case, however, does not seem to us to have any close bearing upon the present. It was there held that Art. 156, Sch. II of the Limitation Act does not apply to proceedings under s. 27 or s. 34 of the Burma Courts Act. Section 27 gives power to the Judicial Commissioner (who is, we presume, in such a case, by reason of s. 2 of the General Clauses Act, a High Court within the meaning of

(1) I. L. R., 10 Calc., 946.

the Limitation Act) under certain circumstances, if in his discretion he thinks fit to do so, to admit a second appeal. Section 34 empowers him, in certain cases, to send for the record of a case and deal with it in his discretion. To apply Art. 156 to such cases would be to use it, not to restrict any rights given to the parties, but to curtail a discretion given to the Court. And this was the ground of decision. Moreover, the procedure under those sections is quite foreign to the Civil Procedure Code.

T. A. P. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice Trevelyan.

SEW BUX BOGLA *v.* SHIB CHUNDER SEN AND ANOTHER.

1886 *July* 30.

Civil Procedure Code (Act XIV of 1882), *ss.* 295, 622—*Rateable distribution —Material irregularity affecting the merits of the case.*

The words of s. 295 of the Code of Civil Procedure, "assets realized by sale or otherwise in execution of a decree," provide only for a case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors.

The words "by sale or otherwise" should be construed as meaning by sale or by other process of execution provided for by the Civil Procedure Code.

The words "a material irregularity" in s. 622 of the Code of Civil Procedure, include an irregularity of procedure materially affecting the merits of the case.

An application of a section of the Code to a case to which it does not apply is a material irregularity within the meaning of the section. *Magni Ram* v. *Jiwa Lal* (1) observed on.

THIS was a rule calling upon one Bhugwan Doss to show cause why an order of the Officiating Chief Judge of the Small Cause Court should not be set aside under s. 622 of the Code of Civil Procedure.

The facts of the case were as follows:—

On the 23rd June 1885 one Sew Bux Bogla obtained a decree for Rs. 1,397-11, in the Calcutta Court of Small Causes, against Shib Chunder Sen and Hurry Narain Sen, which directed payment to be made by monthly instalments of Rs. 50.

(1) I. L. R., 7 All., 336.

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In execution of this decree certain property of the judgment-debtors was attached on the 7th January 1886.

On the 31st August 1885 one Bhugwan Doss obtained a decree against the same defendants for the sum of Rs. 1,241-14-3 payable in monthly instalments of Rs. 100.

On the 8th January 1886, Bhugwan Doss applied for attachment of the defendants' property; on that date a warrant was issued, but the property was never actually attached.

Some time between the 8th and 15th January 1886 the defendants filed their petition of insolvency, and the usual vesting order was made.

The Official Assignee then paid into the Court of Small Causes the amount of the decree obtained by Sew Bux, and the property was released from attachment.

Bhugwan Doss then applied to the Court under s. 295 of the Code of Civil Procedure for a share in the money so paid into Court, and his claim was allowed by the Judges of the Small Cause Court.

On this the rule above mentioned was granted by the High Court to Sew Bux Bogla.

Mr. *Bonnerjee*, in showing cause, contended that there was nothing to show that the Judges of the Small Cause Court had acted without jurisdiction or had exercised a jurisdiction not vested in them, and that under s. 622 these were the only grounds on which the Court would interfere; that illegality did not mean a mistake in law, and cited *Amir Hassan Khan* v. *Sheo Baksh Singh* (1), and *Magni Ram* v *Jiwa Lal* (2).

Mr. *O'Kinealy*, in support of the rule, contended that the money could not be said to have been realized "by sale or otherwise in execution;" the payment was a voluntary one made by the Official Assignee, and on the construction of s. 295 cited *Purshotamdass Tribhovandass* v. *Mahanant Surajbharthi Haribharthi* (3). With reference to the powers of interference by the Court under s. 622, he contended that there had been a material irregularity affecting the merits, inasmuch as the Judges had proceeded under a section which did not apply, and

(1) I. L. R., 11 Calc., 6. (2) I. L. R., 7 All., 336.
(3) I. L. R., 6 Bom., 588.

that this would enable the Court to interfere, citing *Tiruchittambala Chetti* v. *Seshayyangar* (1); *Badami Kuar* v. *Dinu Rai* (2), and *Maulvi Mahammad* v. *Syed Husain* (3).

TREVELYAN, J.—This application raises a question of some importance. It is an application to the Court under the revision section (s. 622) of the Civil Procedure Code to set aside an order made by the Small Cause Court. I have taken some time to consider this case, not because I have entertained any doubt, but because I thought it desirable to hesitate before interfering with the considered judgment of two able and experienced Judges of the Small Cause Court. I have no doubt whatever that the Judges of the Small Cause Court were wrong.

The only question is whether, considering a recent ruling of the Privy Council, and the interpretation which has been given to that ruling by a Full Bench of the High Court of the North-Western Provinces, I have power to interfere. The facts are as follows: On the 23rd of June 1885 Sew Bux Bogla obtained a decree in the Calcutta Small Cause Court against Shib Chunder Sen and Hurry Narain Sen for Rs 1,397-11, to be paid by instalments of Rs. 50 a month.

On the 7th of January 1886 certain property of these defendants was attached in execution of this decree. In considering this case it occurred to me that there might be a question as to whether this attachment was valid, as the decree provides for payment by instalments, and was silent as to execution going for the whole amount in case of the failure to pay any instalments. I do not think, however, that I need consider this question, as the validity of rule 34 of the rules of the Small Cause Court has not been impugned by Mr. Bonnerjee. On the 31st of August 1885 Bhugwan Doss Bogla obtained a decree against Shib Chunder Sen and Hurry Narain Sen for the sum of Rs. 1,241-14-3 to be paid by instalments of Rs. 100 a month.

On the 8th of January 1886 Bhugwan Doss applied for attachment of the defendants' property, and on the same date a warrant of attachment was issued, but the property was not attached. On some day between the 8th and the 15th of

(1) I. L. R., 4 Mad., 383. (2) I. L. R., 8 All., 111.
(3) I. L. R., 3 All., 203.

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January 1886 the defendants filed their petition in the Insolvent Court and the usual vesting order was made.

The result of this was that the Official Assignee obtained a title to the property attached, subject only to Sew Bux Bogla's attachment. To get rid of this attachment the Official Assignee, on the 15th of January 1886, paid into Court the amount of Sew Bux Bogla's decree, and the property was accordingly released.

Bhugwan Doss applied for a share of this money under s. 295 of the Civil Procedure Code, and his claim has been allowed by the Small Cause Court.

Section 295 is as follows: "Whenever assets are realised by sale or otherwise in execution of a decree, and more persons than one have, prior to the realisation, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of the realization, shall be divided rateably among all such persons." In this case I think that no assets have been realised by "sale or otherwise in execution of a decree."

These words, I think, provide only for the case where, by the process of the Court in execution of a decree, property has become available for distribution amongst judgment-creditors.

The section does not compel a judgment-creditor whose debt is satisfied by the judgment-debtor or, as in this case, by a person standing in the shoes of the judgment-debtor, to share with other persons the money received by him in satisfaction of his judgment. The construction put upon the section would prevent a judgment-creditor from coming to an arrangement with his debtor. If the property attached in this case were more than sufficient to pay off both decrees, the attaching creditor, although he has a preferential title to the Official Assignee, would be deprived of his rights by the money being paid into Court.

This result was, I am sure, never contemplated by this section.

It would in reality take away from a creditor the benefit which an attachment gives him against the Official Assignee.

This section was considered by a Bench of the Bombay High Court in the case of *Purshotamdass Tribhovandass* v.

Mahanant Surajbharthi Haribarthi (1). In that case a judgment-creditor executed his decree by arrest. The debtor, on being arrested, paid the amount of the decree, and was discharged. Another judgment-creditor, who had applied for execution of his decree, claimed to be entitled to a share of the money paid by the judgment-debtor.

It was held that this money was not realised by sale or otherwise in execution of a decree, and that "realised" in s. 295 means realised from the property of the judgment-debtor. I do not think that in this case the money was realised out of the property of the judgment-debtor. Suppose that a friend of the judgment-debtor had paid off the decree for him, it is clear that it could not in that case be said that the money was realised out of the property of the judgment-debtor. It surely makes no difference that the money was paid by the Official Assignee. The Bombay High Court points out that the view they take is confirmed by s. 341, cl. (*b*), which provides for the discharge of the judgment-debtor from arrest, "at the request of the person on whose application he has been imprisoned," so, as they say, this seems to assume that the arresting creditor may avail himself of the arrest to enter into any arrangement he thinks proper with the debtor behind the back and independently of other creditors who may have applied for execution. In this case also the attachment would be removed, and the Official Assignee would acquire the property directly the decree is paid off, or an arrangement be come to between him and the attaching creditor.

I think that "by sale or otherwise" means by sale or by other process of execution provided for in the Civil Procedure Code. If the Small Cause Court Judges were right in their construction of the section, the following might occur: A debtor might pay off an attaching creditor who would have to divide the money with other creditors who had applied for execution, and then these other creditors might by attachment or otherwise realise the whole of their money, whereas the first attaching creditor only receives a portion, and could not receive more out of the property of the judgment-debtor, as the judgment-debtor had paid off his debt. The judgment of the Small Cause Court being in my

(1) I. L. R., 6 Bom., 583.

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opinion wrong, the question is whether I can interfere with its order under s. 622 of the Civil Procedure Code.

I can only do so if I think that the Small Cause Court has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

This section has been recently considered by the Privy Council in the case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1). All that case really decides is that s. 622 does not give a right of appeal on questions of law, and that in case where the Subordinate Court has jurisdiction, the superior Court can only interfere where that Court has acted illegally and with material irregularity in the exercise of such jurisdiction.

A Full Bench of the Allahabad High Court in the case of *Magni Ram* v. *Jiwa Lal* (2), held that the Privy Council decided, in the case I have referred to, that only questions relating to the jurisdiction of the Court can be entertained under s. 622. I think that the Privy Council did not only include in s. 622 questions relating to the jurisdiction of the Court, but also questions relating to the *exercise* of the jurisdiction of the Court. The Allahabad Court leaves out of consideration the words "or to have acted in the exercise of its jurisdiction illegally or with material irregularity," words to which the Privy Council distinctly gives effect. Can I in this case say that the Small Cause Court, to use the words of the Privy Council and of the section, exercised their jurisdiction "illegally or with material irregularity"? It is not easy always to draw a clear line between an illegal exercise of jurisdiction and a mistake of law. If A sued B for some property, and the Court gave a decree to C who was not a party to the suit, this would come clearly under this section. The adoption of a procedure different from that provided by law and such as to cause material injury to the suitor could, I think, be dealt with by s. 622. The application of a section of the Code to a case to which it does not apply stands, I think, upon the same footing.

(1) L. R., 11 I. A., 237; I. L. R., 11 Calc. 6. (2) I. L. R., 7 All., 336.

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This is what has been done in the present case. It seems to me that, as held by Mr. Justice Straight and Mr. Justice Turrel, in *Badami Kuar* v. *Dinu Rai* (1), a material irregularity includes an irregularity of procedure materially affecting the merits of the case. The illustration which Mr. Justice Straight gives, namely, the seizure of the costs of a judgment-debtor, in some respects has a resemblance to the present case. I think that the decision of the Small Cause Court must be set aside with costs.

Attorney for Sew Bux Bogla: Baboo *N. C. Bose.*

Attorney for Bhugwan Doss: Mr. *Hart.*

T. A. P. *Rule absolute.*

APPELLATE CIVIL.

Before Mr. Justice Beverley and Mr. Justice Porter.

FAZEL BISWAS AND OTHERS (PLAINTIFFS) *v.* JAMADAR SHEIK AND OTHERS (DEFENDANTS.)*

1886 *June* 24.

Review—Civil Procedure Code, 1882, *s.* 624—*Application for review heard by successor to Judge who passed the decree.*

Where an application for review is presented to the Judge who made the decree, and he thereupon issues notice to the other side, the application is "made" to him within the meaning of s. 624 of the Civil Procedure Code, and may be heard and disposed of by his successor in office. *Karoo Sing* v. *Deo Narain Sing* (2) followed.

THIS case was originally heard by the Munsiff of Jessore who gave a decree in favor of the plaintiffs, and an appeal by the defendants from that decree to the Subordinate Judge was dismissed. The Subordinate Judge afterwards admitted an application for review of his judgment, and directed the application to be registered, and the fees for service of notice to be deposited within three days. The Subordinate Judge left before the review was heard, and it was taken up and heard by his successor, who reversed the decree, and in lieu thereof made a decree dismissing the suit. From this decision the plaintiffs appealed.

* Appeal from Appellate Decree No. 183 of 1886, against the decree of Baboo Promotho Nath Banerji, Subordinate Judge of Jessore, dated the 29th of September 1885, reversing the decree of Baboo Jodu Nath Ghose, Munsiff of Jessore, dated the 15th of December 1884.

(1) I. L. R., 8 All., 111. (2) I. L. R., 10 Calc., 80.

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Baboo *Mohit Chunder Bose* and Baboo *Amarendra Nath Chatterji* for the appellants.

Baboo *Byddi Nath Dutt* for the respondents.

The judgment of the Court (BEVERLEY and PORTER, JJ.) was as follows:—

The only point raised in this appeal is that "the Subordinate Judge has acted without jurisdiction and in contravention of the law in admitting the judgment of his predecessor into review, and in rehearing the appeal. This clearly means that the Subordinate Judge has acted in contravention of s. 624 of the Code.

Now it appears that the application for review of judgment was made, or in other words preferred, to the same Subordinate Judge who made the decree. That Subordinate Judge directed that the application should be entered on the register, and that the requisite fees for service of notice should be deposited within three days. The present case therefore seems to be precisely on all fours with that of *Karoo Sing* v. *Deo Narain Sing* (1) in which it was held than if the application for review is presented to the Judge who made the decree, and if he thereupon issues notice to the other side, the application has been "made" to him within the meaning of the section, and may be heard and disposed of by his successor in office.

We are not prepared to dissent from this view of the law, and we accordingly dismiss this appeal with costs.

J. V. W. *Appeal dismissed.*

Before Mr. Justice Wilson and Mr. Justice Porter.

1886 *July* 26.

GOLAM RAHMAN (PLAINTIFF) *v.* FATIMA BIBI (DEFENDANT.)*

Burma Courts Act (XVII of 1875), *s.* 49—*Restitution of Conjugal Rights—Appeal from decree of Recorder of Rangoon—Civil Procedure Code (Act XIV of* 1882), *s.* 540.

The proviso in s. 49 of the Burma Courts Act amounts to an express declaration that it is a condition precedent to the right of appeal from the Recorder's Court that the suit shall be one which has an amount or

* Appeal from Original Decree No. 374 of 1885, against the order and decree of W. F. Agnew, Esq, Recorder of Rangoon, dated respectively the 6th of February and 1st of April 1885.

(1) I. L. R., 10 Calc., 80.

value capable of being estimated in money, and that that amount or value must fall within certain specified limits.

A suit for the restitution of conjugal rights is incapable of being valued, and no appeal therefore in such a suit will lie under the Burma Courts Act from a decision of the Recorder of Rangoon.

THIS was a suit for restitution of conjugal rights. The defence was that the plaintiff had beaten and cruelly ill-treated his wife, and that her dower had not been paid.

The Recorder of Rangoon, before whom the suit was heard, dismissed the suit with costs on the 1st April 1885.

The plaintiff appealed to the High Court, valuing his appeal for the purpose of jurisdiction at Rs. 5,000, and paying a Court fee under No. 15, Sch. 2, of the Court Fees Act. He also put in an affidavit, which was uncontradicted, that he valued the appeal at that particular sum, inasmuch as his marriage expenses had amounted to Rs. 5,000.

Mr. *Amir Ali*, Mr. *Roberts* and Mr. *Gregory* for the appellant.

Mr. *O'Kinealy* for the respondent took a preliminary objection that no appeal would lie to the High Court under the Burma Courts Act, as no valuation for the purpose of jurisdiction on a suit for restitution of conjugal rights could be placed at all; and therefore the value of the suit for the purposes of jurisdiction could not be said to have exceeded Rs. 3,000, which amount would alone entitle a suitor to an appeal to the High Court under s. 49 of Act XVII of 1875.

Mr. *Amir Ali*.—The objection as to valuation is too late. It ought to have been raised before the hearing by motion to reject or remove the appeal—*Aldridge* v. *Cato* (1). [WILSON, J.—It is not an objection to valuation, but one of jurisdiction.] An objection to jurisdiction founded on valuation comes within the principle laid down by James, L. J. See also *Shire* v. *Shire* (2).

As to the main objection, it is submitted, an appeal does lie. No valuation can be put on suits in which the question of status is involved. In the case of *Shire* v. *Shire* already cited, Lord Brougham lays down the principle in distinct terms; see also *Camilleri* v. *Fleri* (3) and *D'Orliac* v. *D'Orliac* (4),

(1) L. R., 4 P. C., 313.
(2) 5 Moore's P. C., 81.
(3) 5 Moore's P. C., 161.
(4) 4 Moore's P. C., 374.

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and *Re Skinner* (1). In this latter case a suit as to the custody of a minor was held appealable to the Privy Council.

Suits of this character are not contemplated by s. 49 of the Burma Courts Act (Act XVII of 1875), and therefore the jurisdiction vested in the High Court under s. 540 of the Civil Procedure Code (Act XIV of 1882) cannot be ousted by s. 49. This section only refers to cases where the subject-matter of the suit is capable of being assessed at a money value. If the objection of the other side is well founded, the result will be that, whilst there is a right of appeal in every case over Rs. 3,000 in value, no appeal will be given in cases far more important, involving legitimacy, marriage relation, &c., merely because the subject-matter of the suits cannot be assessed at a money value. It was also contended that the affidavit of the plaintiff ought to be taken as conclusive on the question of valuation.

Mr. *O'Kinealy* in reply.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows :—

It appears to us that the objection which has been taken to this appeal must prevail.

If this Court has jurisdiction to entertain this appeal, it must be either by reason of the Burma Courts Act, or by reason of the provisions of the Civil Procedure Code, or both.

This is an appeal from a decision of the Recorder of Rangoon. And the only section in the Burma Courts Act which could be pointed to as giving an appeal to this Court is s. 49. That section says, *first*, that " there shall be no appeal from the decree or order of the Recorder passed in any original suit or proceeding where the amount or value of the subject-matter does not exceed three thousand rupees." That excludes appeals altogether in cases under the sum mentioned. The section then goes on to say, that " where the amount or value of the suit or proceeding in the Recorder's Court exceeds three thousand rupees and is less than ten thousand rupees, an appeal shall lie to the High Court." These are the only words in the section and in the Act giving this Court jurisdiction to hear any appeal from the

(1) L. R., 3 P. C., 451.

Recorder's Court. And then follow excluding words: "Provided that the amount or value of the matter in dispute on appeal must exceed the former sum and be less than the latter."

It appears to us that the effect of this clause is to say that an appeal shall lie within certain limits, and that it shall not lie unless the matter falls within those limits. It therefore amounts to an express declaration that it is a condition precedent to the right of appeal that the suit shall be one which has an amount or value capable of being estimated in money, and that *that* amount or value shall fall within certain specified limits.

The section in the Civil Procedure Code which has been relied upon is s. 540. Now, that section does not deal with the jurisdiction of Courts. It deals with the rights of appeal given to parties. And in enactments of this kind the distinction must always be remembered between sections which confer jurisdiction on Courts, and sections which confer rights on parties. In order to sustain an appeal to this Court it is necessary to show two things, that the party desirous of appealing has the right to appeal, and the Court to which he would prefer the appeal has the right to entertain it.

Section 540 says: "Unless when otherwise expressly provided by this Code or by any other law for the time being in force, an appeal shall lie from the decrees, or from any part of the decrees, of the Courts exercising original jurisdiction to the Courts authorized to hear appeals from the decisions of those Courts." In order to enable us under that section to hear this appeal, it must be shown that this Court is authorized to hear appeals from the Recorder's Court of Rangoon. But this Court is authorized only under s. 49 of the Burma Courts Act, that is to say, in the particular cases already referred to. And it appears to us that the words, "the Court authorized to hear appeals," in s. 540 of the Code, must mean, either the Court authorized to hear appeals from the Courts in question generally, which this Court is not authorized to do in respect of the Recorder's Court, or else the Court authorized to hear such appeals as the appeal in question, which has not been shown of our Court as to this appeal. Even if that difficulty were got over, there would remain another. It must appear that it is not expressly

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provided by any law that such an appeal as this does not lie to this Court. But, as I have already pointed out, s. 49 provides that an appeal shall not lie from the Recorder's Court to this Court unless it is capable of a money valuation, and that money valuation falls within certain limits.

The distinction between suits capable of money valuation and those not capable of such valuation is one perfectly familiar in this country. It has been embodied in Act after Act, especially in the Stamp Acts and the Court Fees' Act ; and a suit of this particular nature and a great many others have been treated in them as suits incapable of valuation.

It appears to us, therefore, that neither the Burma Courts Act nor the Civil Procedure Code gives any jurisdiction to this Court.

It will be right perhaps to mention the affidavit put in by the appellant, in which he professes to place a pecuniary value on the society of his wife against whom he claims a restitution of conjugal rights. But that affidavit cannot alter the real nature and character of the suit, which is one not capable of being valued.

For these reasons we think that this appeal cannot be entertained, and must be rejected with costs.

T. A. P. *Appeal dismissed.*

PRIVY COUNCIL.

GAN KIM SWEE AND OTHERS (DEFENDANTS) *v.* RALLI BROTHERS (PLAINTIFFS.)

P. C.*
1886
March 31.
April 1, 2, *and* 6.

[On appeal from the High Court at Calcutta.]

Contract, Breach of—Alleged breach of warranty by vendor on a sale and delivery of goods—Burden of proof after acceptance, following upon an examination by purchaser.

Under five contracts for the sale of good Burma cutch, to be delivered to a Calcutta firm, in Calcutta, by the vendors, who knew that it was bought for the export market, delivery and acceptance followed upon a searching examination of the cutch by the purchasers.

The latter having sent advices of this purchase to a New York firm, with which they were in partnership, parcels of cutch were sold to different buyers in America, to whom, under such "forward" contracts, the cutch was shipped in separate shipments by the Calcutta firm.

On the arrival of the cutch, objection was taken to its quality by the American buyers, who refused to take delivery. The Calcutta firm, thereupon, sued the vendors under the five contracts above mentioned.

The burden of proof being upon the plaintiffs, who had accepted the cutch after full examination in Calcutta, to prove the breach of contract by the vendors by cogent evidence sufficient to rebut the presumption of due performance that arose from such acceptance, *held* that this presumption was not rebutted in the absence of evidence as to the treatment of the cutch on its re-shipment by the plaintiffs, on the voyage from India to America, and at the port of arrival.

APPEAL from a decree (13th September 1883) of a Divisional Bench of the High Court.

The decree from which this appeal was preferred awarded Rs. 1,13,066, with interest at 6 per cent. and costs, to the respondents, Messrs. Ralli Brothers, of Calcutta, as damages sustained by them in consequence of a breach of warranty of the quality of 9,043 bags of cutch, sold and delivered to them by the appellants, who were Chinese merchants, trading in Calcutta under the style of Eng, Hong & Co. The latter, having a branch firm in Rangoon, traded in cutch, the produce of Burma forests, which, after being sorted, packed in bags, and

* *Present:* LORD BLACKBURN, LORD HALSBURY, LORD HOBHOUSE, and SIR R. COUCH.

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marked with a trade mark in Rangoon by the firm, was shipped to Calcutta.

By five contracts, dated respectively 24th September, 1st, 3rd and 30th December 1879, and 3rd February 1880, Eng, Hong & Co. contracted to deliver to Ralli Brothers, bags of cutch marked ⟨E. G.⟩, to amounts varying from 500 bags to 4,000 bags, "guaranteed to be of the standard quality of the mark" (1), at prices varying from Rs. 9-8 per bazar maund in the first contract to Rs. 12-8 in the last; delivery to be given and taken from the sellers' godowns in Calcutta, within periods, fixed in the contracts, varying from 23rd September 1879 to 6th February 1880.

Ralli Brothers, in Calcutta, having advised their New York firm, the latter, as agents, made contracts for sale of the cutch to other firms in America, of which the Calcutta firm received advice. Delivery of the cutch after examination having been taken in Calcutta, under the above contracts, by the Calcutta firm, they re-shipped and despatched it to America in several shipments, according to the number of "forward" contracts, there being in this case eight.

On arrival every shipment was rejected, with a slight exception. Of 1,500 bags, which had been accepted in Calcutta under the contract of 24th September 1879, only 950 bags were accepted by the American firms. The remaining 550 bags of that batch, together with all the cutch delivered as above stated, and despatched in other shipments to America, were rejected by the American buyers.

The suit out of which this appeal arose was thereupon brought by the Calcutta firm of Ralli Brothers.

The plaint alleged that the marks mentioned in the five contracts for delivery in Calcutta were well known as indicating a prime quality; but the cutch delivered was bad in quality, mixed with other substances, and in the case of some bags fraudulently packed.

The defendants, amongst other things, denied that there was a standard of prime quality in cutch, or that any fixed standard

(1) Initials of a Rangoon firm, Eck Guan.

of quality was meant by the marks; the quality of cutch varying from year to year, and even from month to month of the cutch season. They also denied that the cutch, delivered by them, and accepted after examination by the plaintiffs, was of other quality than that contracted for, or that any had been fraudulently packed.

The construction of the five contracts, and the effect of the examination and acceptance in Calcutta, as well as questions as to the quality of the cutch at the time of the delivery in Calcutta, and as to the alleged false packing, were put in issue.

Part of the evidence consisted of the examination of witnesses taken under commissions issued to Rangoon, New York, and London.

The suit, having been partly heard in the original jurisdiction by one Judge, was then, by consent of parties, and under an order of the Chief Justice, heard and determined by a Bench of two Judges (Norris and Wilkinson, JJ.) The Court held that the marks referred to in the five contracts were used for the purpose of indicating that the cutch was of the average quality packed by the Rangoon firm denoted by the marks, and meant that the cutch was to be good and of a uniform quality. They found, however, that the cutch delivered was not so.

Finding that the defendants knew at the time that the cutch had been bought by the plaintiffs for export, they held that the proper measure of damages was the difference between the price which would have been paid in New York for the cutch, had it been good, and the price that it, being bad, actually realized. The claim in respect of false packing was rejected.

Mr. *A. Cohen, Q.C.*, Mr. *A. Charles, Q.C.*, and Mr. *J. H. A. Branson* appeared for the appellants.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne* for the respondents.

For the appellants, the argument principally urged was that the High Court, in deciding that the cutch delivered was not of such good quality as had been contracted for, had acted upon evidence insufficient in effect to rebut the inference, or presumption, that necessarily arose from the acceptance of the cutch

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in Calcutta after a searching examination. All the evidence pointed to such an examination having taken place. The result was that all the evidence taken under the New York and London commissions was only so far relevant as it might be taken to bear on the question of the long previous condition of the cutch *i.e.*, at the time of delivery in Calcutta; and that evidence affected the real question between the parties remotely only and not directly. Considering the length of time, and the effects of exposure, from which the cutch might well have suffered either in the re-shipment after delivery in Calcutta, or on the voyage, or in New York on arrival, it followed that evidence of its condition, when ultimately rejected by the buyers in America, was no criterion of what it might have been at the time of its delivery in Calcutta. The judgment of the High Court had been given without sufficient regard to where the burden of proof lay, and was incorrect.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne* argued for the respondents that they, who were not precluded by the acceptance in Calcutta from proving inferiority in the quality of cutch actually existing at the time of delivery, had established by the general body of the evidence that the cutch could not have been in a good state when delivered. Thus a breach of contract had been made out. The respondents had sustained damage to an amount at least equal to that awarded by the decree, the appellants having been aware that the market in Calcutta for cutch was an export market, and that the contracts in question were entered into by the respondents with a view to re-shipping the cutch to a foreign port.

Counsel for the appellants were not called upon to reply.

Their Lordships' judgment was delivered by

LORD HALSBURY.—This is an appeal from the High Court at Fort William in Bengal, where judgment was given for the respondents, the plaintiffs below, with damages for the breach of warranties contained in five several contracts for the sale of cutch to the respondents.

The course of the evidence in this case renders it unnecessary to draw any distinction between the first and the four later contracts. It is not denied that in all five contracts the obligation

was to deliver good cutch, and the real dispute in this case is whether good cutch was delivered. Had the evidence raised any distinction between cutch of a peculiar manufacture or quality, as indicated by a recognised mark, it might have been necessary to consider more minutely the effect of the warranties contained in the four later contracts; but the contest between the parties has been conducted on much broader grounds. The 11,000 bags, the subject of the five contracts, were delivered in Calcutta between the 5th of April 1879 and the 26th April 1880.

In the course of the deliveries extending over this period an examination to determine whether it should be accepted as according to contract or not took place. Some was rejected, other cutch substituted, and extra allowance made for weight. This was done in the presence of one or other of the brokers and of the person selected by the purchasers, who made the examination and conducted the examination in the manner in which, at that time, cutch was generally examined. The correspondence between the respondents and their New York agency discloses the fact that upon some telegrams and letters which are not before us, the respondents explained to their agency why they had accepted some which, in their judgment, might not exactly have come up to the contract quality. They say: "We had to reject several lots, receiving only what would pass as prime. We had to complain also in some instances about heavy tare, and we only received such lots with full allowance of weight." Then in a letter dated June 22, 1880, they say: "As you are aware, we were all along receiving our cutch on advancing markets, and although we were very careful in receiving, in many instances we were compelled to accept deliveries which we would have rejected if our market was quiet, and we were not pressed by freight engagements." Then they say: "We may here add, that owing to the strong demonstrations and the rejections made by our competitors and ourselves, the quality and the packing of the supplies since February has improved, and we hope that on arrival you will find an improvement in our shipments." Then again: "We are sorry at not having been aware of the objectionable form of your contracts for cutch, which do not admit of any allowances in case of inferiority of quality, as otherwise we would have certainly

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been much more particular in restricting our business to the very best marks. Being ignorant of this, and seeing our competitors (who had far better experience than ourselves in this article) buy the ⟨EG⟩ mark, we thought that by being careful in the delivery, and receiving full allowances for any inferiority in the quality or extra tare, we could protect ourselves and take our share in this business. On several occasions we have rejected lots for inferiority of quality or false packing (when we were not pressed for shipment), and the same lots have been accepted and shipped by our competitors, and this was an argument of our seller for our being very particular in our deliveries." Then they say again, in a letter dated the 30th July: "After the great disappointments we have had (which, however, have been partly caused by the fact that we were never aware of the clause in your contracts allowing the buyer to reject out-and-out any inferior quality) we shall of course be more careful in our deliveries and ship only really good quality."

It is to be observed that that correspondence, which obviously arises from some telegram not before us, had taken place between the parties before the end of April 1880, and indeed the selected specimen on which so much turns, and which will have hereafter to be dealt with, was taken before the end of April 1880, and throughout the course of delivery in New York, occupying from the 13th April until the 21st October, no complaint whatever is made of either quality or packing until the letter of the 4th November. Mr. Cowie very fairly admitted that, although that letter of the 4th November refers to some communication by these persons, it refers to some verbal communication on or about that time, and the letter itself, when looked at, does not refer to inferiority of quality at all, but refers, apparently, to the question of false packing.

It probably is not necessary, upon this state of facts, and seeing what the course of delivery has been, to put any construction on the Indian Contract Act, since treating it as a matter simply of fact and inference, it is impossible not to see that the evidence of the searching examination at Calcutta, and the period which is allowed to elapse from the time, and during the course of delivery,

extending over the period referred to, renders it at all events incumbent, by very cogent evidence on the part of the respondents, to rebut the inference which justly would be drawn from the acceptance in Calcutta, after such searching examination, that the goods delivered were according to contract.

Their Lordships are of opinion that the Judges of the High Court were right in rejecting the claim in respect of false packing. If the evidence of the condition of the cutch as received in New York was accurate, it is absolutely impossible to suppose that it could have escaped the examination at Calcutta. To take the one specimen which has been more than once referred to of a fraudulently packed bag—there is no other phrase that will adequately describe it—in which there were two or three inches of cutch outside and the interior filled with dirt and rubbish, and which has been referred to once or twice as a piece of evidence that it is impossible to reconcile with a really honest examination at Calcutta, it is worthy of remark that, although a considerable quantity—and, as Mr. Doyne has pointed out in his argument, a very considerable number—of bags were rejected at Calcutta, it was not suggested in any part of the evidence that anything of that sort was discovered during the examination. It would almost have followed, as a matter of course, that if any such fraudulent trick as that had been discovered, the examination would have been much more stringent even than it was. But the respondents took delivery after examination, and if they had sought to show that the article as delivered in New York was the same in quality and condition as to packing as when it was received and accepted by them, they should have given some evidence (for the burden was clearly on them) of its treatment in Calcutta after delivery to them, its loading on board, the conditions of the voyage, and, further, have shown that no changes of heat, moisture, or pressure by superincumbent weight, could have affected the article during the voyage until its delivery in New York. It is obvious that the respondents have offered no evidence on any one of these questions, and it appears to their Lordships they have entirely failed to satisfy the burden which was upon them. But while their Lordships entirely agree with the Judges of the High Court in rejecting the claim as to false packing, they

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are unable to follow the learned Judges in their conclusion as to the inferior quality of the cutch. The judgment apparently depends upon the proposition that the cutch in its original manufacture contained an inordinate quantity of sandy or earthy matter; and that the condition of the cutch was incapable of being discovered in Calcutta upon the examination on account of the semi-liquid state of the cutch. Their Lordships are unable to discover any evidence to justify that finding. If indeed the evidence had established that the liquid state of the cutch at Calcutta had prevented examination, and upon its arrival at New York it disclosed that, as originally manufactured, it was defective, a different question might have arisen; but in truth there is hardly any evidence in support of this branch of the proposition. Their Lordships fail to discover any evidence that the examination at Calcutta was prevented or even affected by the liquid condition of the cutch; and there is absolutely no evidence of the cutch being so manufactured that it contained an undue quantity of earthy or sandy matter. The learned Judges appear to have acted upon their own view of what was described by the sample marked "T 3," and they have regarded this sample, the size of which does not distinctly appear, but which appears to have been taken at the latter end of April 1880, as having sufficiently informed their minds of what was the quality of the 11,000 bags of cutch. Their Lordships are wholly unable to acquiesce in the inference drawn, and therefore will humbly advise Her Majesty that the judgment of the High Court should be reversed, and the suit be decreed to be dismissed with costs, and the respondents will pay the costs of this appeal.

Appeal allowed, with costs.

Solicitors for the appellants: Messrs. *Watkins & Lattey.*

Solicitors for the respondents: Messrs. *Sanderson & Holland*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Macpherson.

RAM NARAIN SINGH AND OTHERS (DEFENDANTS) *v.* RAM RUNJUN CHUCKERBUTTY (PLAINTIFF).*

1886 *June* 24.

Sonthal Pergunnahs Settlement—Regulation III of 1872, *ss.* 24, 25—*Suit to set aside order of Settlement Officer—Non-publication of record of rights.*

Where, in December 1884, a suit was brought to set aside an order of the Settlement Officer under Regulation III of 1872, made in December 1875, after disposing of the plaintiff's objections to the defendants' title, and it was found that no record of rights had been published in accordance with s. 24 of the Regulation : *Held*, the suit was not barred under s. 25 as not having been brought within three years from the date of the order. The final order referred to in that section must be one subsequent to or not preceding the publication of the record of rights.

THIS suit was brought for the reversal of an order of the Settlement Officer, dated 16th December 1875, by which the rights of the first defendant as *mokuraridar*, and of the other defendants as *dur-mokuraridars* of certain mouzahs, were recognized, and for possession of the said mouzahs. The plaintiff alleged that he was in possession of the said mouzahs as zemindar, and that they had been sub-let by him in *ijara* which expired in 1284 (1877); that the settlement proceedings commenced in these mouzahs in 1875, whilst they were so sub-let; that before the Settlement Officer, the defendants falsely represented that they held these mouzahs on *mokurari* and *dur-mokurari* titles, and that the Settlement Officer, notwithstanding an objection filed by the plaintiff, recorded his order to the above effect under Regulation III of 1872. No record of rights, however, as provided by the Regulation, was ever published. The plaintiff denied that the defendants had any such title as had been recognized by the Settlement Officer, and alleged that in 1289 (1883) he demanded possession of the mouzahs from the defendants

* Appeals from Appellate Orders Nos. 110 and 117 of 1886, against the orders of L. R. Forbes, Esq., Deputy Commissioner of Sonthal Pergunnahs, dated the 2nd of January 1886, reversing the orders of J. A. Craven, Esq., Sub-Divisional Officer of Jamtara, dated the 13th of August 1885.

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from the beginning of 1290 (1884), which they refused to give him, and he dated his cause of action from the latter date. The suit was instituted on 20th December 1884. The only defence material to this report was that the suit was barred by limitation under s. 25 of Regulation III of 1872, inasmuch as it had not been brought within three years from the date of the order of the Settlement Officer.

The suit was dismissed on this ground by the first Court; but on appeal that decision was reversed by the Deputy Commissioner, who remanded the case for trial on the merits.

From this decision the defendants appealed to the High Court.

Dr. *Rash Behari Ghose* and Baboo *Jogesh Chunder Day* for the appellants.

Baboo *Karuna Sindhu Mukherjee* for the respondent.

For the appellants it was contended that it was not necessary that the publication of a record of rights should be made before a final order could be made by the Settlement Officer. A final order might be made at any stage; and, as in this case, the order had been made disposing of the plaintiff's objection, and the order had not been appealed from, it was a final order under s. 25 of the Regulation, though made before the publication of the record of rights, and the suit should have been brought within three years from that order.

For the respondent it was contended that the final order referred to in s. 25 applied only to final orders disposing of objections taken to an entry in the record of rights after its due publication under s. 24. Here the objection filed by the plaintiffs was one made under ss. 12 and 14, and not under s. 24, and the order made on it was not a final order; there was consequently no order from which the three years' limitation could commence.

The judgment of the Court (NORRIS and MACPHERSON, JJ.) was as follows:—

It is contended that the lower Appellate Court has put a wrong construction upon that portion of s. 25 of Regulation III of 1872 which enacts that the Civil Courts in the Sonthal

Pergunnahs can entertain a suit brought to "contest the finding or record of the Settlement Officer within three years from the date of the said publication or of the final order of the Revenue Court." The publication referred to is that of the record of rights, which under s. 24 requires to be notified, and published by posting a copy thereof in some conspicuous place in the village, otherwise in such manner as may be convenient. The second clause of that section gives a right to any person interested to bring forward in the Original or Appellate Settlement Courts any objection he may desire to make to any part of such record.

In the present case it is admitted that the Settlement Officer in the course of a settlement held that the defendants were *mokuraridars* of certain villages. But it is admitted also that no record of rights was ever published under s. 24. And the question which now arises is, whether the suit brought to contest that finding is within time under s. 25. We think the construction which the lower Court has put upon that section is the right one. We are practically asked to read for the words Revenue Court in s. 25 the words "Settlement Officer." We see no grounds on which any such construction can be maintained. The words in the section seem to indicate that a suit is within time if brought within three years from the date of the publication, or if there is any subsequent order of the Revenue Court, from such date. Sections 24 and 25 read together show that it is open to any one to question the correctness of the conclusion arrived at by the Settlement Officer, subsequent to the publication of the record of rights. And when we find in the limitation clause that a suit may be brought either from the date of the said publication or from the final order of the Revenue Court, it seems to us that the order of the Revenue Court must be one which follows and does not precede the publication of the record of rights.

We think, therefore, that the view of the lower Appellate Court is right, and that the appeal must be dismissed with costs.

This decision governs the appeal No. 117 of 1886.

J. V. W. *Appeal dismissed.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

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July 7.

KALI KRISHNA TAGORE (PLAINTIFF) *v.* GOLAM ALLY (DEFENDANT.)*

Landlord and Tenant—Suit for ejectment—Repudiation of Title—Setting up different tenure from that alleged by Landlord.

The plaintiff in 1870 brought a suit for rent, in which the defendant set up and filed a permanent *howladari* lease, but admitted that he held at the rent alleged by the plaintiff, and that suit was decreed, the Court thinking it unnecessary to decide the question of the validity of the tenure set up by the defendant. In a suit brought after a notice to quit, which was found to be invalid, to eject the defendant, and for a declaration that he had no such permanent *howladari* tenure as he alleged, the defendant again set up the *howladari* lease under which he admitted he had paid a fixed rent to the plaintiff: *Held*, that though the defendant repudiated the particular holding which the plaintiff attributed to him, he did not question the plaintiff's right to receive the rent, and therefore did not in any sense repudiate his landlord's title. What he did amounted merely to questioning the right of the landlord to enhance the rent, which was not such a disclaimer as would result in law in a forfeiture of his tenure. The plaintiff therefore was not entitled to eject the defendant without giving him a proper notice to quit.

Vivian v. *Moat* (1) distinguished, on the ground that the principle on which it is based is wholly inapplicable in Bengal. *Baba* v. *Vishvanath Joshi* (2) dissented from.

THE facts and contentions in this case are sufficiently stated in the judgment of the Court (PETHERAM, C.J., and GHOSE, J.)

Mr. *Woodroffe* and Baboo *Doorga Mohun Doss* for the appellant.

The *Advocate-General* (Mr. *Paul*), Mr. *Amir Ali*, Mr. *W. M. Doss*, and Baboo *Rash Behary Ghose* for the respondent.

This appeal arises out of a suit brought by the plaintiff Baboo Kali Krishna Tagore, who is the zemindar of Pergunnah Edilpore, against Golam Ally, the defendant, to eject him from certain lands situate in that pergunnah; and for a declaration that the defendant's allegation made in a previous suit between the parties, that

* Appeal from Original Decree No. 262 of 1884, against the decree of Baboo Jagadurlubh Mozoomdar, Rai Bahadur, Subordinate Judge of Furreedpore, dated the 30th of May 1884.

(1) L. R, 16 Ch., 730. (2) I. L. R., 8 Bom., 228.

he, the defendant, had a permanent *howla* interest in the lands, is untrue. The plaint sets forth that the lands in suit, which are within a property named Haturea, were leased out to the defendant's father, one Mahomed Ashak in 1234 (1827,) as a *kursa* or ordinary ryoti tenure, to be held by him as a tenant-at-will; that the said tenure was not granted for agricultural purposes; that subsequently, in the years 1250 (1843) and 1264 (1857) respectively, two dowls or kabuliats were executed by the said Mahomed Ashak in favour of the plaintiff's father, Baboo Gopal Lal Tagore, in respect of the said lands at enhanced rents, the rent reserved by the last dowl being Rs. 421-7-10; that subsequently, in a suit brought by the plaintiff in 1870 for rents of the years 1274 to Srabun 1277 (1867 to July 1870), the defendant set up and filed a permanent *howladari* lease, but at the same time admitting that he had been holding the land at the rent alleged by the plaintiff; that the Court which decided the suit did not consider it necessary to go into the question of the validity of the *howla* set up by the defendant, but decreed the claim for rent, there being, in fact, no dispute as to the amount thereof; that subsequently, in 1284, (1877) the defendant changed the features and character of a portion of the lands by digging tanks without the plaintiff's knowledge, which acts were contrary to the express stipulations of the dowl of 1264, and the custom of that part of the country; that thereupon a notice to quit was served upon the defendant on the 11th Assar 1289 (1882), requiring him to relinquish possession of the lands within fifteen days. The suit was brought upon the basis of the said notice to eject the defendant from the land hitherto held by him, and also to have it declared that the defendant was not entitled to the *howla* which he claimed.

The answer to this suit was that the notice was bad in law; that it was neither sufficient nor reasonable; that the dowls set up by the plaintiff were untrue; that the excavations complained of in the plaint were made some time before the year 1284 from time to time, and that the plaintiff acquiesced in these acts; that in the year 1184 (1777) a remote predecessor of the plaintiff, namely, one Jaswant Rai, who was then entitled to the whole of the mouzah Haturea, granted to the defendant's grandfather,

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Sheikh Domai, a permanent *howladari* pottah for 9 drones 14 kanies and odd of lands at a fixed rental of Rs. 421-7-10; that this rent had ever since been paid to the plaintiff's father and subsequently to the plaintiff; and that the fact of this *howla* was set up more than 12 years ago with the knowledge of the plaintiff and his father, the late Baboo Gopal Lal Tagore; and that, therefore, the plaintiff was now barred by limitation from questioning the *howla*. The written statement further contended that the meaning of the word "*kursa*" as given in the plaint was incorrect; and that the tenants of Pergunnah Edilpore, who had *kursa* rights, could acquire rights of occupancy by occupation for more than 12 years; that even upon the dowls filed by the plaintiff and the statements contained in the plaint it could not be said that the defendant was a tenant-at-will; and that, further, having continued to possess and enjoy the lands at a progressive rent for the reclamation of jungle, and without interruption from generation to generation, from before the Permanent Settlement, a right of occupancy had accrued to the defendant within, or subordinate to, the superior *howladari* interest.

The Court below has held that the person whose signature the notice to quit bears, had no authority whatsoever to give such a notice; that the defendant's tenure is at least a tenancy from year to year; and, therefore, a notice given in the middle of the year, requiring him to quit within fifteen days, was not a reasonable and sufficient notice, and that therefore the plaintiff is not entitled to eject the defendant in this suit.

Upon the matter of the excavation complained of in the plaint, the Subordinate Judge has found that the tanks were dug many years ago without any let or hindrance on the part of the zemindar, and has accordingly held that no ground for ejectment on this score is made out.

The title of the plaintiff to eject having failed, the Court below had next to consider whether or no the plaintiff was entitled to declaratory relief in respect of the *howla* set up by the defendant. Upon this question the Subordinate Judge has found that the lease set up by the defendant, that is to say, the *howladari* pottah of 1184, is a forged document, but that the existence of the *howla*, though not proved to be held at a

fixed rent from before the Permanent Settlement, is made out by the various rent receipts produced by the defendant, which described the tenure as a *howla* tenure, and that the said receipts were granted apparently with the knowledge of the naib and other superior officers of the plaintiff; and it must, therefore, be inferred that the plaintiff and his father were aware of the fact that a *howladari* title had been set up many years ago, that is to say, more than 12 years ago; and, therefore, both upon the ground that the defendant has made out that he has a *howla* right in the property in question, and also upon the ground that the said *howla* had been set up more than 12 years before suit, with the knowledge of the zemindar, the plaintiff is not entitled to question, and is, in fact, barred by limitation from now questioning the said *howla*. As regards the two dowls of the years 1250 and 1264 produced by the plaintiff, as having been executed by the defendant's father, Mahomed Ashak, the lower Court has found that they are untrue, and have been manufactured on the occasion of the rent suit of the year 1870. Having come to these conclusions the Subordinate Judge has dismissed the suit with costs.

The plaintiff has appealed to this Court; and we might here observe that no contention has been raised before us as to the notice served upon the defendant being valid in law, nor that the plaintiff is entitled to eject by reason of the excavations made by the defendant.

The points that have been raised by the learned Counsel for the appellant are: (1) that the setting up by the defendant of a permanent *howladari* right in the property in question amounted to a denial of the ordinary rights of the zemindar; and, therefore, the defendant must be taken to have forfeited his tenure; and the plaintiff is, therefore, entitled to eject the defendant without any previous notice to quit; (2) that the foundation upon which the *howladari* title was based having failed, namely, the lease of the year 1184 having been found by the lower Court to be a manufactured document, the Subordinate Judge ought, consistently with his finding, to have found that the defendant was entitled to no *howladari* interest in the lands; (3) that the rent receipts relied upon by the lower

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Court have not been proved according to law, and are not genuine; (4) that there is no proof whatsoever that as a matter of fact the *howladari* lease of 1184 was set up at any time with the knowledge of the plaintiff or his father previous to the suit of 1870, and therefore the plaintiff is not barred by the law of limitation from now questioning the said *howladari* title; (5) that the dowls produced by the plaintiff ought to have been found by the lower Court to be genuine; and, lastly, that even if the plaintiff be not entitled to eject the defendant, he is, at any rate, entitled to have a declaration to the effect that the *howladari* title set up by him is untrue.

The learned Advocate-General for the respondent, in the course of his arguments in support of the decree of the Court below, contended, among other matters, that the plaint disclosed no cause of action, and that the Court below ought to have found that the *howladari* lease of 1184 was a genuine instrument.

Upon the arguments raised before us, it would appear that there are *two* questions of law, and three questions of fact, involved in this appeal.

The questions of law are: (1) does the plaint disclose a cause of action; and (2) whether, in the absence of a notice to quit, is the plaintiff entitled to eject?

The questions of fact are: (1) whether the defendant is entitled to the *howla* which he claims; (2) whether the *howla* was set up more than 12 years ago with the knowledge of the plaintiff or his father; and (3) whether the defendant's father executed the dowls produced by the plaintiff.

Upon the question whether the plaint discloses any cause of action or not, as raised by the learned Advocate-General, we are clearly of opinion that it does. If the allegations in the plaint are correct the plaintiff has a perfectly good cause of action to maintain the suit. Whether or no the plaintiff has upon the evidence made out a cause of action is a different matter altogether, and a question which will be considered hereafter. We might, however, here observe that even if all other grounds fail, the setting up by the tenant defendant of a permanant tenure—a tenure which cannot be enhanced—is sufficient to give the zemin-

dar a cause of action to come into Court to have that title set aside; and if the plaintiff has made out a case in respect of this matter, he would be entitled to relief.

The next question to be considered is, whether the setting up of a *howladari* title in the suit of the year 1870 by the defendant amounted to a disclaimer of the plaintiff's title as landlord; whether in fact there has been a forfeiture of the tenure by the defendant such that the plaintiff is entitled to evict without putting an end to the tenure by a proper notice to quit. Now it will be observed that, although the defendant in the suit of 1870, and also in the present suit, repudiated the particular holding which the landlord attributes to him, yet he never questioned the landlord's right to receive the rent which it is agreed between the parties was being paid for many years together; he did not in any sense repudiate the landlord's title. What he did was simply to question the right of the landlord to enhance the rent, and that, in our opinion, was not such a disclaimer as would result in law in a forfeiture of the tenure itself. Mr. Woodroffe in support of his contention quoted the case of *Vivian* v. *Moat* (1) and the case of *Baba* v. *Visvan Nath Joshi* (2). In the first mentioned case, the tenant denied the right of the landlord to raise his rent, and set up a title to hold the lands at a customary or quit rent. It was held that this was a disclaimer of the landlord's title, such as would obviate the necessity of a notice to quit. But it will be observed that the decision rests upon the ground that the title to hold land at a customary rent is inconsistent with the ordinary relationship of landlord and tenant, as it exists in England. Fry, J., observes: "Now what is a customary rent? I understand that a customary rent means this: a rent which entitles the occupier to hold so long as he pays. There is therefore the suggestion that the late landlord and the present plaintiffs were not ordinary landlords of this estate, but were either lords of the manor or owners of some other right which gave them a title to a customary rent, which they could demand, and nothing more than that." And it will be further observed from the judgment, that the existence of the tenancy was not admitted until the time when the case came on for argument. We

(1) L. R., 16 Ch., 730. (2) I. L. R., 8 Bom., 228.

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think, therefore, that the principle upon which that decision is based is wholly inapplicable in Bengal, where rights grow up under the law, such as rights of occupancy, irrespective of contract, and where there are numerous tenures held by persons at fixed rents, and it has never been understood in this country that the assertion of such a right is a denial of the landlord's title *as such*. As regards the case cited by the learned Counsel from the Bombay reports, we need only say that it is apparently based upon the case of *Vivian* v. *Moat* and the other English cases quoted therein, and that, for the reasons already mentioned, we are not prepared to follow the rule of law laid down in it.

But apart from these considerations, it appears to us to be perfectly clear, that if there was a forfeiture of the tenancy by what the defendant said in the suit of 1870, there has been since then a distinct waiver on the part of the landlord of his right to evict upon that ground; for it has been found in the judgment of the Court below, and, in fact, it was conceded in the course of the argument for the plaintiff, that since the suit of 1870 the plaintiff has continued to receive the same rent which the defendant had been paying previous to the suit of 1870, until within a short time before the institution of the present suit; and it was not until 1882 that the plaintiff gave the defendant a notice to quit, apparently treating him as a tenant up to that time. And it is further noteworthy that even in the said notice the plaintiff does not rely upon the alleged forfeiture as a ground upon which the defendant should be ejected.

We may here observe that upon the plaintiff's own case as disclosed in his plaint, and the dowls propounded by him, the defendant is at least a tenant from year to year, and that being so, it seems to us to be clear that this tenancy must be terminated by a proper notice to quit before a suit for ejectment can be maintained; and it follows, therefore, that the plaintiff is not entitled to a decree for ejectment in this suit.

(The Court then dealt with the questions of fact: this potiron of the judgment is omitted as being unnecessary for this report.) The result, therefore, is that the claim for ejectment must be

dismissed, but that a declaration must be given in favor of the plaintiff to the effect that the defendant has no *howladari* interest in the lands covered by the suit; and in this respect the decree of the Court below must be altered. 1886

As regards the costs of the suit, we think that each party, having set up a case which is either false or unproven, they should bear their own costs in both the Courts.

J. V. W.

Decree varied.

Before Mr. Justice Mitter and Mr. Justice Norris.

NAUN SINGH (PLAINTIFF) *v.* RASH BEHARI SINGH AND OTHERS (DEFENDANTS).* 1886 *April* 30.

Valuation of Suit—Suit for pre-emption—Jurisdiction—Bengal Civil Courts Act (VI of 1871), *s.* 20.

In a pre-emption suit, the subject-matter is the right of pre-emption, the value of which, and not that of the property itself, determines the question of jurisdiction under s. 20, Act VI of 1871.

THIS suit was brought for the enforcement of the plaintiff's right of pre-emption. The property in dispute was sold to the defendants for Rs. 700. The plaintiff sought to recover possession of it by the cancellation of the aforesaid sale on payment of Rs. 700 to the defendants (purchasers.) The suit was brought in the Munsiff's Court. The defendants amongst other pleas objected to the jurisdiction of the Court, on the ground that the property sought to be recovered was of the value of more than Rs. 1,000.

The Munsiff overruling this objection dismissed the suit upon the merits. The plaintiff preferred an appeal against the Munsiff's decree. The Subordinate Judge, on the objection of the defendants, re-opened the question of jurisdiction, and finding that the property in dispute was of the value of more than Rs. 1,000 dismissed the suit upon the ground that the Munsiff had no jurisdiction to entertain it.

* Appeal from Appellate Decree No. 1257 of 1885, against the decree of Baboo Abinash Chunder Mitter, Subordinate Judge of Patna, dated the 27th of March 1885, affirming the decree of Rai Baboo Sheo Sarun Lal Bahadur, Munsiff of Patna, dated the 28th of April 1884.

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The plaintiff appealed to the High Court.

Baboo *Jogindra Chunder Ghose* for the appellant.

Mr. *M. L. Sandel* for the respondents.

The judgment of the Court (MITTER and NORRIS, JJ.) after setting out the facts as above, proceeded as follows:—

In this second appeal it has been urged that the defendants, respondents, are not entitled to re-open the question of jurisdiction in the Appellate Court, they having not preferred any appeal against the Munsiff's decision upon this point. We are of opinion that this contention is not valid. The defendants, respondents, were entitled to answer the plaintiff's appeal upon the ground that the Munsiff had no jurisdiction to entertain the suit. We think therefore that there is no force in this contention.

The second ground that has been urged before us is that the finding of the Subordinate Judge that the value of the property in dispute is more than Rs. 1,000, does not necessarily lead to the conclusion that the Munsiff had no jurisdiction to entertain this suit. It has been contended that the value of the property in dispute in this case is not necessarily the value of the subject-matter in dispute. The plaintiff offered to pay Rs. 700, the consideration money stated in the conveyance to the defendant. That amount at any rate should be deducted from the value of the property in dispute in order to ascertain the value of the subject-matter in dispute.

We are of opinion that the subject-matter in dispute in this case is the right of pre-emption which the plaintiff asserts that he has in respect of the property in suit. The question for decision, in order to ascertain whether the Munsiff had jurisdiction or not, is as laid down in s. 20 of the Bengal Civil Courts Act (VI of 1871)—what is the value of this right? It is not very easy to lay down any general principle for ascertaining the value of a right of pre-emption in any given case. But it is clear to us that it is not the value of the property itself. For example, if a plaintiff seeks to recover possession of a property covered by his *pottah*, and the rent charged upon the property is of considerable amount, the value of the property itself would not be the value of the right which the plaintiff would seek to recover. Therefore

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it seems to us that in determining the question whether the value of the subject-matter in dispute in this case is above Rs. 1,000, the lower Appellate Court has proceeded upon an erroneous principle. As already remarked, it is not possible to lay down any hard and fast rule for measuring the value of a right of pre-emption in any particular case. But the lower Appellate Court in this case, for reasons already given, was not right in measuring it by the value of the property itself without taking into consideration the fact that the plaintiff has offered to pay to the defendant Rs. 700, and would be bound to make the payment before he could succeed.

It has not been shown therefore that the Munsiff was in error in holding that he had jurisdiction to entertain the suit. That being so, the Subordinate Judge's judgment cannot stand. We therefore reverse that judgment and send back this case to that Court to decide the appeal on the merits. Costs will abide the result.

K. C. M. *Case remanded.*

Before Mr. Justice Prinsep and Mr. Justice Beverley.

SRIHARY MUNDUL (JUDGMENT-DEBTOR) *v.* MURARI CHOWDHRY AND ANOTHER (DECREE-HOLDERS).*

1886 *July* 2.

Limitation—Execution of Decree—Jurisdiction of Court where decree was passed—Transfer of decree for execution—Code of Civil Procedure, ss. 223, 239, 248.

On the 4th of March 1884, a decree-holder applied to the Court of the Subordinate Judge of Moorshedabad (where the decree was passed) for transfer of the decree to the District Court of Beerbhoom for execution. The transfer was made, and, on application by the decree-holder, the judgment-debtor's properties in Beerbhoom were attached. Thereupon the judgment-debtor objected to the attachment, and obtained an order under s. 239 of the Code of Civil Procedure staying the execution proceedings. The judgment-debtor then applied to the Court of the Subordinate Judge at Moorshedabad objecting to the execution of the decree, on the ground that it was barred by limitation. The objection was overruled by the Subordinate Judge, and his

* Appeal from Order No. 150 of 1886, against the order of T. D. Beighton, Esq., Judge of Moorshedabad, dated the 19th of January 1886; affirming the order of Baboo Nobin Chunder Ganguli, Subordinate Judge of Moorshedabad, dated the 22nd of September 1885.

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decision was upheld on appeal to the District Judge. On second appeal to the High Court,

Held, that the Moorshedabad Court was competent to hear and determine the plea of limitation.

Held, also, that the fact of the judgment-debtor's not raising the plea of limitation in the Beerbhoom Court did not, under the circumstances, preclude him from relying on it in his subsequent application to the Court at Moorshedabad.

THIS was an application for execution of decree. The judgment appealed from was, so far as material, as follows:—

"The dates in connection with this appeal which relates to the execution of a decree are as follows:—

Decree obtained in the Court of the Subordinate Judge of Moorshedabad	5th May	1877
First application for execution		1878
Struck off	June	1878
Second application	22nd December	1880
Notice to judgment-debtor	14th January	1881
Served	28th January	1881
Struck off for default	19th April	1881
Third application containing a prayer for transfer to the Court of the Subordinate Judge of Beerbhoom where the judgment-debtor's property is situated...	4th March	1884

"Subsequently an order for sale of certain property took place at Beerbhoom, but no sale has actually occurred.

"Finally the judgment-debtor applied to the Subordinate Judge of Moorshedabad alleging that the third application was barred, and praying for an order to stay execution at Beerbhoom. The execution proceedings have been stayed, but the Subordinate Judge has decided the present application in favour of the decree-holder, considering that the application is not barred.

"Against this decision both parties have appealed, the judgment-debtor urging that the proceedings are barred, and the decree-holder by way of cross-appeal argues that the Subordinate Judge of Moorshedabad had no jurisdiction to try the objection which ought to have been made at Beerbhoom.

"Before deciding the main point at issue I deal chiefly with the argument of respondent that the third application was not barred by limitation when presented. The order of 19th April was that

the decree-holder do pay into Court two annas postage stamps and 'the decree (*sic.*) within five days.' This was apparently not done, and the case was struck off for default on the 19th April. The respondent argues that there being no provision in the Civil Procedure Code for 'striking off' an execution proceeding, the application was never dismissed, and the decree was alive on 4th March 1884. He cites a case of *Biswa Sonan Chunder Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy* (1) in support of this view. This case does not apply here; for whether the expression 'struck off' in the present proceeding was the correct one or not the order passed certainly amounts to a dismissal. The order was not passed by the Court for its own convenience, or of its own motion, but after default had been made by the decree-holder in carrying out an order passed by the Court. No steps were taken by the decree-holder under s. 108 of the Civil Procedure Code to get this order set aside, and no step in aid of execution having been taken between January 1881 and March 1884, the decree was at this latter date barred by limitation.

"The main question is whether the decree has been revived by the proceedings in the Court of Beerbhoom, or rather whether the judgment-debtor, having neglected to plead limitation in the proper Court, is now precluded from raising the point at Moorshedabad. A number of authorities have been cited as regards the powers of a Court executing a decree sent to it for execution, and I have considered these very carefully. The principal authority is the case of *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (2). The following principle appears to have been established by this case even if the proceedings were (as they undoubtedly were) barred by limitation when the decree reached the Beerbhoom Court. The order of the Beerbhoom Court allowing execution to revive, is, if unreversed, valid, provided that the Beerbhoom Court had jurisdiction to try whether it was barred by time or not."

The learned Judge then went on to discuss the cases of *Mina Konwari* v. *Juggat Setani* (3); *Lutfullah* v. *Kirat Chand* (4);

(1) I. L. R., 10 Calc., 416. (2) I. L. R., 8 Calc., 51.
(3) I. L. R., 10 Calc., 196.
(4) 13 B. L. R., Ap., 30; 21 W. R., 330.

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Nursing Doyal v. *Hurryhar Saha* (1); and *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (2). He found that the Beerbhoom Court had acted with jurisdiction, and he held that the proceedings were not barred by limitation.

The judgment-debtor appealed to the High Court on the following grounds: (1), that the case of *Mungal Pershad Dichit* had no application to the present case, as the proceedings in the Beerbhoom Court were not brought to the knowledge of the judgment-debtor, and no notice of the application of the 4th of March had been served on him; (2), that the Judge was wrong in deciding against the judgment-debtor without finding whether he had or had not notice of the proceedings in the Beerbhoom Court; (3), that the judgment-debtor was not bound to take the plea of limitation in the Beerbhoom Court, and that he was entitled to take it in the present proceedings.

Baboo *Troyluckho Nath Mitter* and Baboo *Rutnessur Sen* for the appellant.

Baboo *Nil Madhub Sen* for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

This appeal relates to the execution of a decree passed by the Subordinate Judge of Moorshedabad, which has been transferred under s. 223 of the Code of Civil Procedure, to the District Court of Beerbhoom. The application for transfer was made on the 4th March 1884, and before transferring the decree, the Subordinate Judge of Moorshedabad issued the notice required by s. 248 on the judgment-debtors. After report made of due service, the proceedings requisite for transfer of the decree were taken. On the application of the decree-holder, certain properties belonging to the judgment-debtors were attached in the district of Beerbhoom, on which one of the judgment-debtors objected to the attachment, and obtained an order under section 239 staying execution of the decree so as to enable him to apply to the Moorshedabad Court to consider his objections. The exact terms of this order are not before us, because the order in appeal is from the Moorshedabad Court, and the

(1) I. L. R., 5 Calc., 897. (2) I. L. R., 8 Calc., 51.

proceedings of the Beerbhoom Court have not been sent up. However, for the purposes of this appeal, it is sufficient to say that the Beerbhoom Court passed an order under section 239. The Subordinate Judge as the Court which passed the decree and the District Judge in appeal have concurrently rejected the objection made by the judgment-debtor, that execution was barred by limitation, and they have relied on the judgment of the Privy Council in the well known case of *Mungal Pershad Dichit* v. *Grija-Kant Lahiri* (1). It appears to us that both the Courts have misapprehended this judgment of the Privy Council in applying it to the present case. In that case the objection raised was that the sixth application for execution was barred by limitation, and that therefore the seventh application, that is, the application under which the proceedings were then being taken, was inoperative. Their Lordships held that no objection had been raised in the course of the proceedings taken on the sixth application, but that the debtor had appeared, and in applying for the postponement of the sale had submitted to the attachment of his property. The Privy Council accordingly held that the Court could not re-open the previous proceedings. In the case before us, the objection is taken to the application now before the Court. The District Judge appears to have held that the objection of limitation cannot be allowed to be raised by the judgment-debtor, because he has submitted to certain proceedings in the Beerbhoom Court. But the only proceeding taken by that Court against him was one of attachment of his property, and the judgment-debtor forthwith objected to such attachment, and obtained an order from the Court staying further proceedings under s. 239. There was consequently no adjudication of this point against the judgment-debtor in the Beerbhoom Court.

The next question raised is whether the Moorshedabad Court had any jurisdiction to entertain such objection, the decree having been transferred to the Beerbhoom Court for execution. The terms of ss. 239 and 242 seem to us to recognise the jurisdiction of the Moorshedabad Court. The cases which have been cited to us merely show that the Court to which a decree has

(1). I. L. R., 8 Calc., 51.

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been transferred for execution has jurisdiction to determine an objection of limitation, such as has been raised in the present case; but none of the cases go so far as to exclude the jurisdiction of the Court which passed the decree. In the present case the notice under s. 248 was passed by the Moorshedabad Court, and the judgment-debtor before us also contends that his objection that no service of this notice was made should be heard by that Court. One of the objects of serving such a notice is to enable the judgment-debtor to object to execution of the decree because it is barred by limitation, and therefore we also think that the Moorshedabad Court from which the notice issued would be the proper Court to determine this matter, although it might also have been raised and decided by the Court at Beerbhoom. We may refer to s. 224 (*c*) under which the Court sending a decree for execution by any other Court is required to send a copy of any order that may be passed for the execution of the decree. In this case we apprehend that the Moorshedabad Court would have sent a copy of the order made by it on receipt of the report of the service of the notice under s. 248. As it has been held that, but for *Mungal Pershad Dichit's* case, execution of the decree is barred by limitation, and that case, in our opinion, does not apply, the order of the lower Court must be set aside and its finding on the actual facts accepted. In substitution for the orders passed, it will accordingly be declared that execution is barred by limitation. The judgment-debtor will receive his costs of all the Courts.

P. O'K. *Appeal allowed.*

Before Mr. Justice Mitter and Mr. Justice Agnew.

1886 *April* 30.

MISRI LAL AND OTHERS (FIRST PARTY, DEFENDANTS) *v.* MOZHAR HOSSAIN (PLAINTIFF) AND OTHERS (SECOND PARTY DEFENDANTS.)*

Mortgage—Mortgage of crops that may be grown upon a certain plot of land, its nature and effect—Transfer of Property Act—Contract Act.

The mortgage of indigo crops that may be grown upon a certain plot of land is a valid transaction.

* Appeal from Appellate Decree No. 1251 of 1885, against the decree of Moulvi Abdul Aziz, Khan Bahadoor, Subordinate Judge of Sarun, dated the 17th of March 1885, affirming the decree of Baboo Nepal Chunder Bose, Munsiff of Sewan, dated the 19th of August 1884.

The transaction is neither governed by the Transfer of Property Act nor by the Contract Act; but it is in the nature of an agreement to mortgage moveable property that may come into existence in future.

MAHOMED ASGAR hypothecated, under a registered bond of the 22nd March 1883, for the sum of Rs. 397, being the price of the seed supplied, all the indigo crop that might grow on a certain plot of land during the year in favour of Mozhar Hossain. Subsequently under a bond of the 3rd August he mortgaged the same crop to Misri Lal & Co. Before the expiration of the term of their bond the latter instituted a suit against Mahomed Asgar for the payment of their money, and *pendente lite* obtained an order of Court prohibiting him from removing certain indigo cakes, and under colour of that order conveyed the goods from the debtor's factory to their own godown. Mozhar Hossain now brought a suit against Misri Lal & Co. as the principal defendants, for the enforcement of his lien on the said indigo. The Munsiff found that Misri Lal & Co. had appropriated the indigo which was the subject of the mortgage under the bond of the 22nd March, and being of opinion that the plaintiff by virtue of his hypothecation bond had a prior lien on the produce gave a decree against the principal defendants for the sum stipulated in the bond. On appeal the Subordinate Judge confirmed the decree. On second appeal to the High Court, it was contended *inter alia* that "on a proper construction of the plaintiff's mortgage deed, the lower Courts should have held that no mortgage at all, at least none regarding future indigo, was created in favour of the plaintiff by the deed set up by him, and that the said deed did not create any right in favour of the plaintiff (the deed not being operative as a mortgage deed at all) regarding what is alleged to have been taken by the defendants, so that the plaintiff might be entitled to follow the same in their hands."

The *Advocate-General* (Mr. *Paul*), Munshi *Mahomed Yusuf* and Baboo *Dwarika Nath Mookerjee* for the appellants.

Munshi *Serajul Islam* for the respondents.

The judgment of the Court (MITTER and AGNEW, JJ.) was as follows:—

It has been contended before us that the mortgage upon which

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the plaintiff relies is not valid under the Transfer of Property Act. We are of opinion that the Transfer of Property Act does not deal with a mortgage of this kind. Future indigo crops that may be grown upon a certain plot of land belonging to the mortgagor were mortgaged. A mortgage of this kind does not come within the purview of the Transfer of Property Act. Neither can it be called a pledge of specific moveable property. It is a mortgage of moveable property that may come into existence in future. Such a transaction as this is neither governed by the Transfer of Property Act nor by the Contract Act. The transaction in question is in the nature of an agreement to mortgage moveable property that may come into existence in future. We see no reason to hold that it is not valid. It has been recognized in Courts of Justice in this country; see *Lala Tilokdhari Lal* v. *Furlong* (1).

We dismiss the appeal with costs.

K. C. M. *Appeal dismissed.*

Before Mr. Justice Mitter and Mr. Justice Grant.

1886 *May* 27.

SAJIBULLAH SIRKAR (DEFENDANT) *v.* HAZI KHOSH MOHAMED SIRKAR (PLAINTIFF).*

Registration Act, ss. 73, 76, and 77—*Suit for registration of document.*

An application having been made under s. 73 of the Registration Act, the Registrar passed the following order: "All the parties have not appeared, the appeal is struck off. It, however, seems to me that the order of the Sub-Registrar was quite correct." *Held*, that the mere fact of the applicant not having adduced any evidence before the Registrar did not make his order one not refusing registration within the meaning of s. 76; nor was the applicant precluded on that ground alone from pursuing his remedy under s. 77 by a civil suit.

THE suit, out of which this appeal arises, was brought under s. 77 of the Registration Act for obtaining a decree directing the registration of a document alleged to have been executed by the defendant in favor of the plaintiff. The registration of this

* Appeal from Appellate Decree No. 144 of 1886, against the decree of C. A. Kelly, Esq., Judge of Dinagepore, dated the 6th of October 1885, reversing the decree of Baboo Sudhangsu Bhusan Roy, Munsiff of Dinagepore, dated the 1st of August 1885.

(1) 2 B. L. R., A. C., 230.

document was refused by the Sub-Registrar under s. 73. Within 30 days of the order of refusal by the Sub-Registrar an application was made to the Registrar to whom the said Sub-Registrar was subordinate, in order to establish the applicant's right to have the document registered. The applicant, however, did not appear before the Registrar on the date appointed for holding the enquiry into the question whether the document was executed or not, and no evidence having been offered by either party, the application was refused. The plaintiff then, within the time mentioned in s. 77, instituted this suit. The Munsiff was of opinion that the plaintiff was not entitled to institute it under the provisions of s. 77, inasmuch as he had not adduced any evidence before the Registrar to establish the facts required by law to be established. The District Judge being of a contrary opinion, and finding that the document was executed, awarded a decree against the defendant.

The defendant appealed to the High Court.

Baboo *Josoda Nundun Pramanick* for the appellant.

Baboo *Gurudas Banerjee* for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) after stating the facts as above, proceeded as follows :—

In this second appeal it is contended on behalf of the defendant appellant that the Munsiff's view of s. 77 is correct. Section 77 says, omitting the parts which are not material to the question before us, that where a Registrar refuses to order a document to be registered under s. 76, any person claiming under such document may, within 30 days after the making of the order of refusal, institute in the Civil Court a suit for a decree directing the document to be registered. The question therefore is whether there was a refusal by the Registrar to order the document to be registered under s. 76. We are of opinion that the mere fact of the applicant not having adduced any evidence before the Registrar does not make his order one not refusing registration within the meaning of s. 76. The absence of evidence to establish the execution of the deed cannot be a test with reference to the question whether there is or not a refusal under s. 76, because there may be cases in which the applicant,

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after taking all the steps available to him, may fail to compel the attendance of his witnesses, and it would be unreasonable to hold in a case of that description that the applicant was not entitled to the remedy by civil suit under s. 77. It seems to us that where it is found that the application was a *bonâ fide* application under s. 73, and where it does not appear that the applicant abandoned his application, he would not be precluded from pursuing his remedy under s. 77 by a civil suit merely on the ground that no evidence having been adduced by him before the Registrar, the Registrar refused registration.

We therefore agree with the District Judge in the view he has taken of the provisions of s. 77. The appeal will be dismissed with costs.

K. C. M. *Appeal dismissed.*

Before Mr. Justice Mitter and Mr. Justice Grant.

1886 *May* 31.

HURO CHUNDER ROY (DEFENDANT) *v.* SURNAMOYI (PLAINTIFF).*

Limitation Act, s. 5—Discretion of Court—Appeal out of time, admission of.

Section 5 of the Limitation Act gives a discretion to a Court to admit an appeal filed out of time.

A valued his suit at Rs. 18,000, which was reduced to less than Rs. 5,000 by the Court of first instance at Rajshahye. A decree, dated the 20th December 1883, was given against the defendant, who applied for copies on the 3rd of February, and the decree was ready on the 7th. The defendant was apparently under the impression that the appeal would lie to the High Court; but on the 16th of March a letter was despatched by his Calcutta agent informing him that he was mistaken and that the appeal lay to the District Judge. This letter reached Rajshahye on the 17th, and the appeal was filed on the 23rd of March.

Held, that under the circumstances the Court might admit the appeal in the exercise of its discretion under s 5 of the Limitation Act.

THIS suit, which was instituted in the Court of the Subordinate Judge of Rajshahye, was one for khas possession of certain mouzahs and valued at Rs. 18,000. The Court decreed the claim, but upon the objection of the defendant reduced the value to

* Appeal from Appellate Decree No. 238 of 1886, against the decree of F. J. G. Campbell, Esq., Judge of Rajshahye, dated the 5th of October 1885, affirming the decree of Baboo Promotho Nauth Mookerjee, Subordinate Judge of that district, dated the 20th of December 1885.

Rs. 4,178-10-5 and allowed proportionate costs. The decree was dated the 20th of December 1883. The defendant (judgment-debtor) applied for copies on the 3rd of February and the decree was ready on the 7th; the defendant, on account of the valuation put by the plaintiff at Rs. 18,000, being then under the impression that the appeal would lie to the High Court. On the 17th of March a letter from his Agent at Calcutta reached him at Rajshahye informing him that he was mistaken, and that the appeal would lie to the District Judge. The appeal was filed in the District Court on the 23rd of March. On the above state of facts the appellant prayed for the admission of his appeal which was clearly beyond time.

The District Judge passed the following judgment, and rejected the appeal with costs: "This appeal is admittedly out of time; but the appellant seeks to have it admitted on an affidavit purporting to account for the delay and of which the sum and substance (all verbiage stripped off) is this simpliciter, that he thought the appeal would lie to the High Court and so delayed filing it in this Court. Giving him credit for so thinking, his mistaken thoughts cannot override the law of limitation."

The defendant appealed to the High Court.

Baboo *Rasbehari Ghose* and Baboo *Girija Sunkur Mozoomdar* for the appellant.

Baboo *Srinath Dás*, Baboo *Gurudas Banerjee* and Baboo *Jogesh Chunder Roy* for the respondent.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows:—

It appears to us that the lower Appellate Court in this case has rejected the appeal as filed out of time and refused to admit it under s. 5, on the ground that a *bonâ fide* mistake made by the appellant in the respect of the limit of time within which according to law he is bound to file his appeal is under *no circumstances* a valid ground for admitting an appeal under s. 5.

We are of opinion that is not a correct view of the provisions of s. 5. It is for the Judge in each case to exercise his discretion, having regard to the particular facts established before him.

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We upon that ground set aside his order rejecting the appeal and remand the case to him to decide that point again.

We may, however, point out that if the facts stated before us are correct, and if the matter had been left to us to decide, we should have been very much inclined to think that the appeal should be allowed to be filed under s. 5. We may here state the facts that have been stated before us. The decree of the lower Court is dated 20th December 1883; the suit was valued at Rs. 18,000, but on the objection of the defendant the Court decided that the value of the subject-matter of the suit was below Rs. 5,000. The appellant applied for copies on the 3rd of February, the decree was ready on the 7th of February; the appellant being then under the impression that the appeal would lie to the High Court. Then on the 16th of March a letter was received from his agent at Calcutta, informing the appellant that he was mistaken, and that an appeal would lie to the District Judge. This letter reached Rajshahye on the 17th, and the appeal was filed on the 23rd of March.

The costs of this hearing will abide the result.

K. C. M. *Case remanded.*

CIVIL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Grant.

BHAIRAB CHUNDRA CHOWDHRI (PLAINTIFF) *v.* ALEK JAN (DEFENDANT.)*

1886 *April* 28.

Stamp Act, 1879, *s.* 13—*Suit on bond—Stamp, Sufficiency of.*

A bond stipulated that for the consideration of a loan of Rs. 80 the debtor should deliver to the creditor on a future day "800 arris of grain valued at Rs. 10 per 100 arris." The bond was engrossed on an 8-anna stamp paper. In a suit on the bond for the recovery of 800 arris, at 4 arris per rupee, or its price, Rs. 200:

Held, that the bond was adequately stamped.

THIS was a reference in a suit which was brought to recover 800 arris of grain, or their value at 4 arris per Re. 1. The Munsiff disallowed the claim as to a moiety on the ground that

* Civil Reference No. 5A of 1886, made by Baboo Baroda Prasanna Shome, Subordinate Judge of Chittagong, dated the 10th of February 1886.

the bond had been engrossed on a stamp paper of 8 annas only, and the plaintiff could not, under a bond so stamped, recover more than 400 arris of grain, or their value, Rs. 100. The bond which was dated the 17th Bhadro stipulated that in consideration of a loan of Rs. 80 the defendant should deliver to the plaintiff within the month of Magh 800 arris of grain valued at Rs. 10 per 100 arris. Both the plaintiff and the defendant appealed against the order, the former contending that the bond was sufficiently stamped, and the latter that it was a forgery.

The Appellate Court was of opinion that the stamp on the bond was insufficient to cover the claim of Rs. 200, and referred the following question to the High Court: Is the bond adequately stamped under the provisions of s. 13, Act I of 1879?

Baboo *Akhil Chunder Sen* for the appellant.

The decision of the Court (MITTER and GRANT, JJ.) was as follows:—

MITTER, J.—We are of opinion that the Subordinate Judge was not right in holding that the instrument upon which this suit was brought was not properly stamped. The amount secured by the instrument is the value of the paddy agreed to be made over to the creditor, as fixed by the instrument itself. If there be a rise in the price of the paddy at the time of the institution of the suit, it would not make the instrument an instrument which is not sufficiently stamped under the Act. If the view of the Subordinate Judge were correct, it would be impossible for the parties to the document to fix the value or the amount to be secured for the purpose of determining what stamp duty should be paid.

The record will be sent back.

K. C. M.

CRIMINAL REVISION.

Before Mr. Justice Mitter and Mr. Justice Grant.

1886
July 22.

POONIT SINGH (PETITIONER) *v.* MADHO BHOT AND ANOTHER (OPPOSITE PARTIES.)*

Penal Code, s. 182—*False information to a public servant, Charge of—Criminal Procedure Code, s.* 195—*Sanction to prosecution—Separate convictions for one statement, Illegality of.*

An information was given to a police officer in the course of which two persons were named in whose houses stolen property belonging to a certain individual would be discovered: on complaint the information was found to be false, and the accused was convicted and punished for two offences under s. 182 as affecting two different persons. *Held*, that although the information related to two different persons, the accused could be charged with having made only one false statement, and punished for one offence under s. 182.

Section 195 of the Criminal Procedure Code clearly shows that a complaint directly made by a public servant mentioned therein is quite as sufficient as his sanction.

Empress of India v. *Radha Kishan* (1) dissented from.

THIS was an application for revision under s. 435 of the Criminal Procedure Code. The petitioner, Poonit Singh, was a resident of Bhutowli in Arrah, of which village Anandi Doss was a part proprietor. A theft was reported to have taken place in the house of Anandi Doss, and a police inquiry was pending. On the 3rd of April, Poonit Singh appeared before the District Superintendent, and asked that the houses of certain zemindars and mahajans of Arrah be searched, as he had overheard "four bad characters of his village (Bhutowli) say in the cutchery verandah that they had committed the theft in Anandi Doss's house and the stolen property was in the houses of Chunder Koomar, Abdulla and another." In consequence of this information, which was duly recorded at the thanna the same day by the Sub-Inspector, the Police searched the houses of Chunder Koomar and Abdulla. No property was found, and the origina case was reported as false.

* Criminal Revision No. 282 of 1886, against the order passed by J. R. Hand, Esq., Deputy Magistrate of Arrah, dated the 23rd of June 1886.

(1) I. L. R., 5 All., 36.

Upon complaint the Deputy Magistrate convicted Poonit Singh on two distinct charges under s. 182 of the Penal Code, one in the matter of Chunder Koomar and the other in that of Abdulla, and sentenced him to three months' imprisonment under each head.

It was contended on behalf of the petitioner before the High Court (1) that the Deputy Magistrate had no jurisdiction to try an offence under s. 182 upon the complaint of a private person without the previous sanction of the public servant concerned; and (2) that the Deputy Magistrate was in error in awarding two distinct punishments for one and the same offence.

Mr. *R. Mittra* and Baboo *Bhagobati Charan Ghose* for the petitioner.

The judgment of the Court (MITTER and GRANT, JJ.) was as follows:—

Two points of law have been argued before us: *first*, that the Magistrate was not authorised by law to allow this prosecution to be instituted on the complaint of a private individual. In support of this contention the learned Counsel who appeared for the petitioner has cited a ruling of the Allahabad High Court —*Empress of India* v. *Radha Kishan* (1). With due deference to the learned Judge who decided that case, we are unable to take the view which has been taken in it. The language of s. 195 clearly shews that it would be quite sufficient if either the sanction of the public servant mentioned therein were given, or a complaint is directly made by him. That being so, we are unable to agree in the proposition of law laid down in the case cited before us. This point therefore fails, but upon the second point which has been taken before us, we think that the conviction and sentence in one of the two cases are bad. The accused person was charged with having given a false information to a public servant, and in that information no doubt he mentioned the names of two persons in whose houses he, the accused, was informed that stolen property belonging to Anandi Doss would be found, but the statement is one, and therefore he

(1) I. L. R. 5 All., 36.

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could be charged only with having made one false statement. He was therefore erroneously tried for two distinct offences under s. 182. We therefore set aside the conviction and sentence in the second case, *viz.*, the case which was initiated on the complaint of Sheikh Abdulla. The conviction and sentence passed by the Magistrate in the case which was instituted on the complaint of Madho Bhot, gomastah of Baboo Chunder Coomar, will stand.

K. C. M. *Conviction quashed in part.*

Before Mr. Justice Prinsep and Mr. Justice Beverley.

IN THE MATTER OF THE PETITION OF YACOOB.

1886 *August* 4.

YACOOB *v.* ADAMSON.*

Presidency Magistrate—Summary trial—Conviction in non-appealable case—High Court as a Court of Revision—Code of Criminal Procedure, ss 370, 437.

In every case which is not appealable to the High Court, a Presidency Magistrate should state his reasons for convicting the prisoner, so that the High Court may judge as to whether there were sufficient materials before the Magistrate to support the conviction.

In a case where the accused was convicted of theft and sentenced to six months' rigorous imprisonment, the notes of the evidence taken by the Magistrate did not afford sufficient materials upon which the prisoner could be legally convicted, and the Magistrate had omitted to record his reasons for the conviction under s. 370, cl. (*i*) of the Code of Criminal Procedure.

Held, by the High Court as a Court of Revision, that the conviction and sentence must be set aside, notwithstanding the provisions of s. 437 of the Code of Criminal Procedure.

IN this case the accused Sheikh Yacoob applied to the High Court by petition, under the provisions of s. 439 of the Code of Criminal Procedure, praying that a finding and sentence passed by the Presidency Magistrate in a case wherein the petitioner was charged with the theft of certain Government Currency Notes should be set aside on the ground that there was no evidence on the record to support the conviction. The Chief Magistrate's judgment was as follows :—

* Criminal Revision Case No. 305 of 1886, against the order passed by Mr. F. J. Marsden, Chief Presidency Magistrate, Calcutta, dated the 8th July 1886.

"In this case Captain Adamson missed a note for Rs. 100 and some Rs. 10 notes from his cabin to which apparently accused No. 1, Yacoob, had access and in fact was in charge of. Nothing was heard of the property for about a fortnight, when a Rs. 100 note seems to have been changed by the second accused Rahim Bux who told the witness Adels that he got the note from accused No. 1. The number of the note for Rs. 100 has not been satisfactorily traced, and that being so, I am of opinion that the second accused must be acquitted. As to Yacoob I have no doubt whatever that it was he who committed the theft, and the order is that he does undergo six months' rigorous imprisonment."

Mr. *H. E. Mendies* for the petitioner.

Mr. *W. C. Bonnerjee* for the Crown.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows :—

Captain Adamson, commander of the *Queen of Scots*, lost some currency notes from the pocket of his trousers which were in his cabin. He says that he fetched the petitioner before us who was the steward of the ship, and some others, and sent for the Police. The matter however proceeded no further at that time as no sufficient evidence was obtained. The petitioner then left his service, but a fortnight afterwards, in consequence of the changing of some notes, suspicion fell upon him, and he was placed with another man before the Presidency Magistrate on trial for the same theft. In the result the Presidency Magistrate held that the stolen notes had not been satisfactorily traced, and he consequently acquitted the other person. But with regard to the petitioner, the steward, the Presidency Magistrate stated that he had "no doubt whatever that it was he who had committed the theft, and the order is that he do undergo six months' rigorous imprisonment." There is nothing in the notes of the evidence taken by the Magistrate on this trial on which, so far as we can see, the petitioner could have been legally convicted ; or which carries the case against him one step further than when it was first investigated by the Police. The order passed is not appealable, but the matter has come before us as a Court of revision on an application made

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by the petitioner who is under sentence. The Code of Criminal Procedure does not provide for the manner in which evidence should be recorded by a Presidency Magistrate in a case in which the sentence or order is not appealable, but it enacts (s. 370) that instead of recording a judgment in the manner provided for other Courts, a Presidency Magistrate shall record certain particulars, amongst which clause (*i*) declares that he shall record a brief statement of the reasons for the conviction. In the case before us, we have no evidence at all on which the petitioner could have been convicted, and the Magistrate, in convicting him, has omitted to record any statement of the reasons for the conviction. Reference may be made to s. 537, which declares that no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on revision on account of any error, omission or irregularity in the judgment unless such error, omission or irregularity has occasioned a failure of justice. In the present case it is impossible to say what the result of this error, omission or irregularity on the part of the Presidency Magistrate may or may not have been. As the case now stands before us, there is absolutely no evidence against the petitioner, and there is no statement of any valid reasons on which the convicton could be supported. If a conviction such as this were to be maintained the powers of this Court as a Court of Revision could never be exercised. We cannot suppose that this was intended by the Legislature. The case of *Empress* v. *Panjab Singh* (1). was a case analogous to that now before us, the matter under revision there being an order passed on a summary trial in which the Magistrate had failed to comply with clause (*h*), s. 263, which required him to "record a brief statement of the reasons of the conviction."

In that case it was held that the Magistrate should state those reasons in such a manner that this Court on revision may judge whether there were sufficient materials before him to support the conviction. Following that case we are of opinion that the conviction and sentence must be set aside.

P. O'K. *Conviction set aside.*

(1). I. L. R., 6 Calc., 579

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

IN THE MATTER OF DURGA CHARAN DAS *v.* SASHI BHUSAN GUHO AND OTHERS.*

1886 *August* 3

Criminal Procedure Code, s. 133—*Public way—Nuisance—Removal of obstruction—Jury—Majority of Jury.*

When a minority of a Jury appointed under the provisions of s. 133 of the Criminal Procedure Code do not act the Magistrate cannot proceed under that section upon a report submitted by the majority.

THIS was a reference by the Sessions Judge of Backergunge, the terms of which were as follows:—

"I have the honor to submit herewith the record of the proceedings of the Magistrate of the District under Chapter X, Criminal Procedure Code, on the petition of Durga Charan Das against Sashi Bhusan Guho and others, and to recommend that for the reasons subjoined the final order of the Magistrate be set aside and he be directed to proceed afresh *ab initio* according to law.

"It appears that on the 30th October 1885, Durga Charan Das of Runshi, a neighbour of the ap[illegible] for revision, presented a petition to the Magistrate, to [illegible] that the applicant for revision and nine others had closed a public path by means of a thorny hedge and plantain trees planted across the same.

"On the petition is endorsed the examination of the petitioner by the Magistrate: "The defendants have bunded my road in Soshipore, south of my 'bari'; they have cut it and planted on it suparis and plantains, and a new fence, and pulled down a '*char*' that was there. It is a frequented path leading to the Government road." The petitioner was required to adduce evidence in seven days. On the 9th November two witnesses were examined, and the same day the Magistrate ordered "Notice to defendants under s. 133 to clear the road or show cause on the 18th." On the 18th November, the applicant for revision Sashi Bhusan Guho entered appearance and showed cause by a counter-petition. The notice under s. 133 of the Criminal

* Criminal Reference No. 150 of 1886, made by J. F. Bradbury, Esq., Sessions Judge of Backergunge, dated the 23rd of July 1886.

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Procedure Code seems to have been directed to the applicant for revision alone, and required him to remove the hedge or fence and other obstructions, and to restore the path or road to its former condition before the 18th November, or show cause against Durga Charan Das's petition on that day, but neither it nor the petition refers expressly to the "char" or bamboo bridge over the trench or ditch which severed the path in two. The counter-petition of the applicant for revision denied that he had obstructed any public path or road, affirmed the falsity of the petitioner Durga Charan Das's allegations, and moved the Magistrate to appoint a jury to pronounce whether the order directed to him was reasonable and proper. The defence of the applicant for revision appears to have been throughout that what the petitioner termed a permanent public path or road was in reality a temporary private path or foot-way over the applicant's own land. The Magistrate thereupon appointed a jury, consisting of the Sub-Registrar of Backergunge foreman, Rajmohon Chakrabarti and Ramcoomar Pal nominated by the Magistrate, and Bishumbhur and Mohima Chunder Ghatak nominated by the applicant for revision, and instructed them to submit their award by the 18th November.

"The time for the submission of the award was extended by successive order of the 28th November, the 10th December, the 21st December, the 4th January, the 18th January, the 22nd February, the 27th February, the 8th March, the 15th March, the 10th and 29th April, but to no purpose. No award could be secured, and on the 11th May the Magistrate called on the parties to move for a fresh jury. Eventually, on the 20th May, the Magistrate appointed a fresh jury consisting of the Sub-Inspector of the Backergunge police station foreman, Mani Chunder Ganguli and Raj Kumar De nominated by the Magistrate and Jagat Chunder Dass and Kali Nath Dutto nominated by the applicant for revision. The 2nd June was appointed for the submission of their award and an extension to the 11th June was accorded on the 2nd.

"On the 11th or the following day was received a document bearing the signatures of the Sub-Inspector of the Backergunge police station Prasunna Mukherjee, Mani Chunder Ganguli and

Raj Kumar De. It states that the jurymen nominated by the applicant for revision had taken no part in the award; that Jagat Dass had not assisted at any deliberation of the jury, and that Kali Nath Dutto had at first attended, but subsequently absented himself. The nominees of the applicant for revision have therefore submitted no award at all.

"The other three jurymen reported that there was a path used by the public along the line indicated by the petitioner over the property of the applicant for revision, that the bridge over the trench separating what had been Shumbhu Mushrif's homestead, but was at the date of the report a plantation of the petitioner's, and the homestead of the applicant for revision, was a great convenience, and that its existence prejudiced nobody. The Magistrate on the 12th June accepted the report as the award of the majority of the jury, and held that the "char" was a public way, the bank of the ditch across which it was thrown being used in common by inhabitants of the village who crossed by the "char." "*The rest of the alleged path is a mere private matter of complainant's.* I therefore order," he added, "that defendant shall within ten days replace the "char" and I make no further order. This order is under s. 139. Issue notice under s. 140." Accordingly the applicant for revision was notified of the order and instructed to reconstruct the bridge over the trench in ten days. The notice bore date the 16th June, and against it the applicant for revision now moves. The notice expresses that the order of the 14th November had directed the reconstruction of the bridge. In fact that order does not allude to the bridge, but merely instructs the applicant for revision to remove all obstructions to the use of the path or road and restore it to its pristine condition. Again, the final notice requires merely the replacement of the bridge and not the re-opening of the obstructed path leading to the bridge.

"Of what use is the bridge if blocked completely at one end? The applicant for revision blocked the path leading to the bridge, and the bridge being thereby rendered useless dismantled it. Now he has been enjoined to replace the bridge, but "the rest of the *alleged* path is a mere private matter of complainant's." The Magistrate talks of the "alleged path," but I take it that there

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was a path which the applicant for revision has closed. Else there would have been no bridge. I do not, however, understand the remainder of the passage last quoted. "The rest of the alleged path," says the Magistrate, "is a mere private matter of complainant's." What is "the rest of the alleged path?" The whole of the path or road save the few cubits spanned by the bridge? And what is the meaning of the phrase "a mere private matter of complainant's?" Does it denote the Magistrate's conviction that as regards the rest of the path claimed the petitioner Durga Charan Das may have an easement or right of way, but there is no public right of way? It seems susceptible of no other meaning, and yet the signification I have attached to it stultifies the final order which is limited to the reconstruction of the bridge. As I have already remarked, what is the use of a bridge blocked completely at one end? Yet the Magistrate has not enjoined the removal of the block or obstruction, to wit the fence or hedge. The applicant for revision has been required merely to reconstruct the bridge on its original site and make it "purbabot" or as it was before.

"Before proceedings under s. 133 of the Criminal Procedure Code can be legally instituted it is the Magistrate's duty to find upon evidence that the path or road in question is or may be lawfully used by the public. It must be a way to which the public are entitled as of right, not a way over a piece of waste land the use of which has been suffered by the owner or tenant of the land. A permissive way may be obstructed at pleasure by the owner or tenant of the land over which it runs. In this instance the Magistrate did not find that the way was public before appointing the jury. The publicity of the way was not a question for the jury, and moreover the Magistrate is clearly of opinion that a part at least of the subject of the dispute does not concern the public. Ergo the appointment of a jury was irregular. *In the matter of the petition of Chunder Nath Sen* (1) and confer *Basaruddin Buiah* v. *Bahara Ali* (2) and *Askar Mea* v. *Sabdar Mea* (3) and *Lal Miah* v. *Nazir Khalashi* (4).

(1) I. L. R., 5 Calc., 875; 6 C. L. R., 379.

(2) I. L. R., 11 Calc., 8.

(3) I. L. R., 12 Calc., 137. (4) I. L. R., 12 Calc., 696.

"Again it cannot be said that the verdict of three jurymen out f five, two of whom did not express any opinion, and one of whom bstained altogether from the enquiry, is the verdict or award f the majority of the jury. One of the jury having declined o act the only course legitimately open to the Magistrate was to ppoint a fresh jury—*Uma Churn Mundle* v. *Joshein Sheikh* (1), r proceed under s. 141 of the Criminal Procedure Code.

"Finally, there is the order absolute, which does not consist with the original notice under s. 133 of the Criminal Procedure Code, and which as it stands cannot be other than infructuous. A literal compliance therewith will leave the path or road obstructed as before, and nothing but literal compliance therewith can be enforced under s. 188 of the Indian Penal Code. I think the whole proceedings should be set aside, and the Magistrate directed to proceed afresh according to law."

No one appeared on the reference

The judgment of the High Court, (PRINSEP and BEVERLEY, JJ.) was as follows :—

The majority of the jury contemplated by s. 139 of the Code of Criminal Procedure is, in our opinion, a majority of the jurors appointed, arrived at after due deliberation amongst themselves. In the present case the majority consists of the only jurors who took the trouble to attend the meetings held. The report so submitted cannot therefore be regarded as a finding of the majority of the jurors under s. 139 on which the Magistrate can act. But at the same time the Magistrate is competent to act under s. 141 and pass such orders as he may think fit. And as matters now stand, we think that we may take the order before us as one so passed on the further materials supplied by the parties.

We find no valid objection to the order regarding the "char" or bamboo bridge over the ditch. The petitioner has been found to have removed it, and its removal is an obstruction to the passage hitherto enjoyed. We accordingly decline to interfere.

P. O'K.

(1) I. L. R., 11 Calc., 84.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Porter.

1886 *July* 30.

KALA CHARA TEA CO., LD. (PLAINTIFFS) *v.* SUKUL SINGH AND OTHERS (DEFENDANTS).*

Boundary dispute—Possession, Evidence of—Bengal Act V of 1875, *ss.* 40, 41, 59, 60, 62—*Suit based on Title.*

A formal decision on the question of boundary in a boundary dispute under s. 62 of Bengal Act V of 1875, although conclusive as to possession, is no bar to a suit based upon title.

THIS was a suit brought to recover *khas* possession of six kedars of land held by the plaintiffs under certain settlement pottahs; the plaintiffs stated that they had been dispossessed in 1289 B. S. (1882), and had thereupon brought a suit under s. 9 of the Specific Relief Act for possession, that that suit was dismissed on the 4th September 1882, and that they brought the present suit for the purpose above mentioned on the 8th September 1884.

The defendants contended that the boundaries of the land given by the plaintiff Company were incorrect; that at the recent settlement these lands had been leased out to them under a pottah, and the boundaries laid, and the land had been held by them for more than 12 years.

The Assistant Commissioner, who was also Sudder Munsiff, found that the boundaries given in the plaint were correct; that on reference to the map made by the Civil Court Ameen, and to the measurements made by him, the land belonged to the plaintiffs' pottah, but that according to the recent survey it appeared that the land had been included in the defendant's pottah; but after taking into consideration the evidence given by the plaintiff Company, he held that the land belonged to the plaintiff Company; he therefore gave them a decree.

The defendants appealed to the Deputy Commissioner of Cachar, who held that the suit was barred under s. 62 of Bengal

* Appeal from Appellate Decree No. 2181 of 1885, against the decree of J. Kennedy, Esq., Deputy Commissioner of Cachar, dated the 11th of July 1885, reversing the decree of Baboo Nritya Gopal Chatterjee, Munsiff of Cachar, dated the 27th of January 1885.

Act V of 1875, inasmuch as no appeal under ss. 59 or 60 of that Act had been made against the order fixing the boundary of the mehals; he therefore allowed the appeal.

The plaintiff Company appealed to the High Court.

Mr. *O'Kinealy* (with him Mr. *Macnair*) for the appellants contended that the suit should not have been treated as a suit to set aside an order deciding a boundary dispute under Bengal Act V of 1875, and that s. 62 of that Act did not apply; that there had been no boundary dispute to which the plaintiffs had been parties; and that no issue having been raised as to the alleged boundary dispute, and no ground of appeal as to the application of the said Act having been preferred against the judgment of the Munsiff, the Sub-Judge was not justified in assuming that an order adverse to the plaintiffs had been come to under the Act.

Baboo *Aukhil Chunder Sen* for the respondents.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

This is a suit brought to recover certain lands which, the plaintiffs say, were included in the pottah or pottahs under which they held their property from the Government, and from which they say they have been dispossessed by the defendants.

A number of issues were raised, and the Munsiff disposed of those issues in such a manner as to entitle the plaintiffs to the decree they asked for.

On appeal, the Deputy Commissioner of Cachar has reversed that decision on one ground. He says, with reference to a survey which had been made apparently about the year 1881 or just previously, "the laying of the boundary mehals during the recent settlement was not appealed apparently either under s. 59 or s. 60 of Bengal Act V of 1875, and therefore under s. 62 of the same Act the present suit is barred.—It has been argued that the dispute has been going on for a long time, and that legal proceedings were entered into regarding the matter previous to the laying of the boundary, but that does not appear to me to make any difference. The present suit admittedly was brought after the relaying of the boundary by the Settlement Officers,

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and it is to the date only of the present suit that I can look." He has therefore held that the proceeding of the Settlement Officers under Bengal Act V of 1875 was by s. 62 of that Act conclusive.

Now, s. 62 refers to an order deciding a boundary dispute. Boundary disputes are dealt with in the fifth part of the Act. Section 40 says: "If it shall come to the notice of the Collector, in the course of a survey under this Act, that a dispute exists as to any boundary which should be surveyed, the Collector, after holding such inquiry as he may deem necessary, may determine such boundary as hereinafter provided." That clearly contemplates that there shall be a dispute between certain parties, that there shall be a proceeding between those parties in which they shall have an opportunity of stating and establishing their several claims, and in which the Collector is to decide the boundary as between the parties. The nature of the decision and the matter to be decided are stated in the next section. Section 41 says, that "the Collector shall determine the boundary according to actual possession, and cause it to be secured by boundary marks, and the order of the Collector under this section shall, until it be reversed or modified by competent authority, have the force of an order of any Civil Court, declaring the parties to be in possession of the land in accordance with the boundary as determined by the Collector." Therefore what the Collector is to determine, in a proper proceeding, is the fact of possession, and he is to lay down the boundary line according to actual possession. He is not to inquire, and has no jurisdiction to inquire, as to any question of right or title. Sections 59 and 60 give appeals to certain superior revenue authorities, and then comes s. 62, which says: "No suit shall be brought to set aside an order of a Superintendent of Survey, Collector, Assistant Superintendent, or Deputy Collector deciding a boundary dispute, unless an appeal shall have been first preferred under s. 59 or s. 60, or unless the person suing was at the time when such order was passed a minor, or insane, or an idiot." In the present case there is not shown to have been any boundary dispute between the present parties to this suit. There is not shown to have been any proceeding before a

Revenue Officer to which these persons were parties, or in which they were represented. Therefore there was nothing in existence which could enable the Revenue Officer to decide a question of boundary between them under s. 40. Further, if there had been such proceeding before the Revenue Officer, and if he had decided anything he would have decided the fact of possession, and his order would operate only as to the fact of possession. And as the only thing as to which a suit is forbidden by s. 62 is the setting aside of an order deciding a boundary dispute, it follows that if there had been the most regular proceeding and the most formal decision on the question of boundary in a boundary dispute, though that would have been conclusive as to possession, under s. 62 it would have been no bar to a suit based upon title.

For these reasons we think that the decision of the lower Appellate Court cannot be supported, and must be set aside.

The Deputy Commissioner has not dealt with the other issues arising in this suit in a way which appears to us sufficient to enable us to dispose of the case. It is necessary therefore that the case should go back to him in order that he may decide those issues.

The appellant will have his costs of this appeal.

T. A. P. *Appeal allowed and case remanded.*

Before Mr. Justice Prinsep and Mr. Justice Beverley.

CHUNDER COOMAR ROY AND OTHERS (DECREE-HOLDERS) *v.* GONESH CHUNDER DASS AND OTHERS (JUDGMENT-DEBTORS).*

1886 *June* 8.

—Possession, Suit for—Mesne profits—Decree silent as to mesne profits—Power of Court executing Decree—Hindu Law—Daughters' sons—Representatives—Reversioners, Liability of for acts of widow.

Plaintiff sued for possession of certain lands and for mesne profits. He obtained a decree for possession, but the decree was silent as to mesne profits. *Held*, that the Court executing the decree was not competent to entertain a claim for mesne profits made by the decree-holder.

A Hindu, governed by the Bengal School of Hindu law, brought a suit for possession of a certain taluk, but died before decree, leaving him surviving a

*Appeal from Order No. 344 of 1885, against the order of Baboo Rakhal Chunder Bose, Roy Bahadur, Subordinate Judge of Furreedpore, dated the 15th of June, and amended on the 24th of September 1885.

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widow and two daughters. The widow was substituted in the suit instead of her husband, and she obtained a decree for possession. By a summary order made in execution of the decree the widow was put in possession of the taluk as well as of certain lands, which lands were claimed by a person not a party to the suit, as lands not belonging to the taluk. The claimant afterwards brought a suit for these lands against the widow. The widow died during the suit, and was succeeded by her daughters who also died after a decree for possession of the lands had been obtained by the claimant against them, when their sons were substituted in their stead as defendants. It appeared that the widow, the daughters and the daughters' sons had all been in possession of the disputed lands as a portion of the family estate.

Held, that the reversioners, the daughters' sons, were liable as the legal representatives of the daughters, and as such were liable for all costs incurred in the suit brought by the claimant for possession of the disputed lands.

IN this case the judgment appealed from was as follows:—

"In this execution case the judgment-debtors and the receiver of the Estate of Raj Chunder Dass have preferred the following objections: (1) The decree cannot be executed against the Estate of Raj Chunder Dass nor against his reversionary heirs; (2) that the mesne profits and damages for cutting down trees as well as Rs. 10,000 the value of the produce of kamar lands cannot be claimed in execution of the present decree; (3) that the decree-holders cannot get any interest on the costs awarded by the Privy Council decree; (4) that execution cannot be taken against the receiver without the permission of the High Court; (5) that the assignment by which the present decree-holders have acquired their title is not *bonâ fide* and genuine.

"It is necessary to give a short history of the litigation which has continued for a very long time between the parties and their predecessors in interest.

"A certain jote and one taluk originally belonged to the Moonsees, who, in 1825, executed a kutkobala or deed of conditional sale for a consideration of Rs. 20,000 to Raj Chunder Dass, the husband of Rash Money Dassi of the aforesaid taluk. Repayment not having been made Raj Chunder Dass took foreclosure proceedings under Regulation XVII of 1806 to make the sale absolute, and in 1835 instituted a regular suit for possession of the said taluk against the Moonsees.

"Raj Chunder Dass having died pending the suit, his sonless widow, Rash Money Dassi was substituted in his place as plaintiff who, in 1840, obtained a decree for possession of the taluk against the said Moonsees, which decree was confirmed on appeal in 1843 by the Sudder Court.

"While the suit was pending another suit for arrears of rent of the aforesaid jote was instituted, and a decree was obtained by one Ram Rutton Roy against the said Moonsees, and in execution of the said rent decree, the jote itself

was sold to one Jagat Chunder Roy in 1836, who, through the Court of the Deputy Collector which held the sale, obtained possession of the jote in 1839.

"After Rash Money obtained her decree for possession of the taluk in 1840, she applied for execution, and thereupon disputes regarding the boundaries of the taluk and jote lands arose between her and Jagat Chunder Roy, which disputes were subsequently terminated by a summary order of the Sudder Court in 1845, by which Rash Money Dassi was confirmed in the possession of the lands as part of her taluk.

"In the present execution proceedings before me possession of those lands and wasilat have been asked for.

"Jagat Chunder Roy sold the jote to one Ramdhun Sirkar, whose three sons afterwards sold it to one Tarrakant Banerjee, who, in 1856, instituted a regular suit against Rash Money Dassi and others to recover possession of those lands as part and parcel of his purchased jote, and also for mesne profits for 10 years and 7 months, commencing from Magh 1252 (January 1846) to Shrabun 1263 (July 1856) amounting to Rs. 24,308-13 annas.

"From the plaint in that regular suit it appears to me that subsequent wasilat up to the date of recovery of possession was not claimed. At least I find no distinct prayer for the same.

"The defence set up in that regular suit by Rash Money Dassi, who represented the estate of her husband Raj Chunder Dass, was that the lands claimed by the plaintiff Tarrakant were included in and were part of her husband's taluk, and property which he had got under and by virtue of the aforesaid *kutkobala* from the Moonsees, to whom I have said already both the taluk and the jote originally belonged.

"In 1857, the Principal Sudder Ameen of this district dismissed the suit, and the decree was confirmed on appeal by the Sudder Court in 1860, but the Privy Council reversed both decrees and remanded the case for trial on the merits. The Principal Sudder Ameen again dismissed the suit on the merits in the year 1867, but the High Court, on the 7th of August 1868, reversed the decree, and gave a modified decree in plaintiff's favour, which was subsequently confirmed by the Privy Council on the 22nd March 1879. Plaintiff Tarrakant Banerjee had, in the meantime, died, and his sons and heirs were substituted as plaintiffs in his place. Rash Money Dassi had also died, and her daughters were substituted as defendants in her place.

"When the Privy Council decree was sent to the High Court for execution, the sons and the heirs of Tarrakant Banerjee had assigned the property and their interests in the decree to the present decree-holders, and by an order of the High Court the present decree-holders were substituted in the place of the original decree-holders.

"All the daughters of Rash Money Dassi had in the meantime died, and the decree-holders have now asked to execute the decree against the reversionary heirs of Raj Chunder Dass and against his estate, which is now in the hands

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of the receiver, making him also a party to the proceedings. Hence the objections which I have written at the beginning have been taken by them.

"I will first take those which relate to mesne profits and interest on the costs awarded by the Privy Council decree. Although I find from the plaint that there was a prayer for wasilat, yet as the High Court judgment and decree, dated 7th August 1868, which for the first time gave some substantial relief to the plaintiff, are silent about mesne profits, I cannot in execution give such profits to the decree-holders. The Privy Council decree is also silent about interest on costs incurred in England: when the decree is silent about interest, it cannot be recovered in execution. The Court executing the decree has no power to assess mesne profits unless ordered in the decree, and the period fixed in it—*Mosoodun Lall* v. *Bheekaree Sing* (1); *Seth Gokul Dass Gopal Dass* v. *Murli* (2); *Wise* v. *Brojendro Coomar Roy* (3); *Sadasiva Pillai* v. *Ramalinga Pillai* (4); *Fakharudin Mahomed Ashan* v. *The Official Trustee of Bengal* (5).

"It has been argued that the dispossession caused by Rash Money Dassi was a wrongful act in her own individual capacity, and therefore the estate of her husband, much less the reversioners, are not liable under the decree. But I find that there is nothing to show that Rash Money was not acting in good faith and in the belief that the lands which formed the subject of the suit really belonged to the estate of her husband (*vide* her written statement which she filed in the suit). No collusion or fraud has been proved against Rash Money and her daughters. I find that the suit was properly conducted by them in the belief that the lands in question formed part of Raj Chunder Dass's estate and for the benefit of the reversionary heirs. I also find that Rash Money simply carried on the suit instituted by her husband, and at the execution proceedings plaintiff's predecessors in interest were dispossessed under that belief which gave rise to all this litigation. I do not find that the suit was personal against the widow Rash Money.

"It has not been shown that the decree has been obtained against the widow or her daughters fraudulently or collusively. It is admitted that the lands in suit were in possession of Rash Money and her daughters, and on the death of the latter the reversioners are still in possession of those lands through the Receiver of the Court as part of the estate of Raj Chunder Dass. Under such circumstances, I hold that the reversioners and the estate of Raj Chunder Dass are liable in these execution proceedings, and the property and costs of the decrees will be recovered from them.

(1) B. L. R., Sup. Vol 602: 6 W. R., Mis., 109.
(2) I. L. R, 3 Calc., 602.
(3) 11 W. R, 200.
(4) 15 B. L. R., 383: 24 W. R., 193; L. R., 2 I. A., 219.
(5) I. L. R., 8 Calc., 178.

"But as the estate and the lands in suit are now in the hands of the Receiver there will be an order of the Court to him to give up possession of those lands and also to pay costs of the suit and of execution to the decree-holders out of the estate of Raj Chunder Dass. He is not personally liable, but the Court is bound to take notice of his existence, and on a reference to his letter of appointment, which he got under s. 503 of the Civil Procedure Code, I find that he has been authorized by the High Court to institute and defend suits, &c., relating to the estate of Raj Chunder Dass. For this Court or for the decree-holders to take any permission from the High Court is not necessary. The Receiver, if he likes, can take permission from the High Court to pay up the decretal amount and to give up possession.

"The pleader for the Receiver said that the Receiver has no objection to the decree-holders taking possession of the decretal lands, I therefore direct that possession be given to the decree-holders under the directions of the High Court decree dated 7th August 1868, according to the accompanying Ameen's map and report by the Civil Court Ameen, and costs of the decrees and of execution are to be realized from the estate of Raj Chunder Dass, and the Receiver be directed to pay them up to the decree-holders.

"If the defendants have done any damage to the decretal lands after the suit was brought or after the final decree was obtained by cutting down trees, &c., the decree-holders cannot recover them in the execution proceedings. I therefore disallow that portion of their claim which relates to damages as well as to the value of the produce of kamar lands.

"As regards the 5th objection, I find that the original decree-holders were the benamidars of the present decree-holders, and that the lands in question really belong to the latter. The original decree-holders have admitted these facts and the substitution was made in the High Court. It has not been shown that the assignment was not *bonâ fide* or genuine.

"It has been argued that the present decree-holders are only entitled to Rs. 5,000 under the decree, which they have paid to the original decree-holders for the assignment. But I find that by the said assignment the decree was not sold. The above sum was paid to them for allowing their names to be used in this litigation and for the trouble and annoyance which they had suffered. The property virtually belongs to the present decree-holders and the deed of assignment only proves the fact of benami. It is not a deed by which the decree was sold. I therefore disallow the objection of the judgment-debtor on this point, and hold that the present decree-holders are entitled to take possession of the property and to get the costs mentioned in the decrees as well as execution costs."

From this decision the decree-holders appealed to the High Court, on the ground that the Judge should have allowed mesne profits and damages in the execution proceedings as well as interest on costs decreed, while the judgment-debtors filed

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cross-objections raising the same points as they relied on in the Court below.

Baboo *Srinath Das* and Baboo *Unnoda Pershad Banerjee* for the appellants.

Mr. *Woodroffe*, Mr. *Evans*, and Baboo *Jogendro Chunder Ghose* for the respondents.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was as follows :—

This is an appeal arising out of the execution of a decree obtained by the appellants against Jugodumba and Pudmomoni, the daughters of Raj Chunder Dass and his widow Rash Money. It appears that, after foreclosure, Raj Chunder Dass instituted a suit for possession of certain mortgaged property. During the pendency of the suit he died; and his widow Rash Money was substituted as plaintiff and obtained a decree. In execution, she entered into possession of lands belonging to a third party, who thereupon brought a suit against her to recover those lands. She died while that suit was under trial, and a decree was obtained in this Court against her daughters Jugodumba and Pudmomoni, who, at her death, were the next heirs of Raj Chunder. A third daughter Sree Coomary, it may here be mentioned, predeceased Rash Money, and therefore did not succeed with her sisters. Jugodumba alone appealed to the Privy Council. Her appeal was dismissed. The appeal now before us relates to the execution of that decree as regards mesne profits and costs. The question has also been raised whether execution can be taken out against the Receiver who has, in the meantime, been appointed to the estate of Raj Chunder by an order of this Court in its Original Jurisdiction.

The Subordinate Judge has refused to allow the decree-holders mesne profits on the ground that they were not expressly given by the decretal order. It is not clear whether mesne profits were asked for in the plaint. The appeal before us has been argued on the assumption that they were, but as, after full consideration of the law on the subject as contained in the reported decisions, we are of opinion that such mesne profits cannot be allowed, we have not thought it necessary to consider whether

or not they were so claimed. The learned pleader for the decree-holders, appellants, relies on the authority of the case of *Rajah Leelanund Singh* v. *Moharajah Luchmessur Singh* (1), followed by the case of *Gurudas Roy* v. *Stephens* (2), in contending that although mesne profits were not expressly given by the decree, still inasmuch as they had been asked for in the plaint and were directly connected with the possession given to his clients, the lower Court was wrong in refusing to allow such mesne profits. These cases, however, are no direct authority for this contention. The case of *Rajah Leelanund Singh* merely decided that whereas in a former order of remand, their Lordships were unable to pass any final order in the case, but simply left it to the High Court to proceed in the suit as upon the result of the enquiry that they had ordered might seem just, it was competent to the High Court to allow mesne profits, and that they should, under the circumstances of the case, have been allowed. "Had the first part of the order in Council stood alone," their Lordships remark, "it would have been one of the consequential directions proper to be given to ascertain the amount of mesne profits at the time that possession of the villages was given; and inasmuch as one part of the order, namely, that with regard to possession, has been executed by the High Court, everything connected with that possession should be executed at the same time." The order passed by the High Court that they could not give mesne profits or any thing beyond what the Privy Council in its decree had given was therefore set aside. The case of *Gurudas Roy* v. *Stephens*, was one in which a party who, having obtained a decree which was set aside in appeal, had, notwithstanding, executed it, was directed to make restitution to the opposite party by putting him exactly in the same position in which he would have been if the decree had not been put in execution. It was held that it was unnecessary for the Appellate Court to pass any orders expressly on this point. So far, therefore, the cases relied upon by the appellant's pleader are not directly in his favour. On the other hand, the course of decisions is directly against

(1) 13 Moore's I. A. 490; 14 W. R., P. C. 23.

(2) 13 B. L. R., Ap., 44; 21 W. R., 195.

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him. It was held by a Full Bench of this Court in the case of *Musoodun Loll* v. *Bhikaree Sing* (1), that in executing a decree, the Court that executes it has no power to alter or add to it, and that the only question in regard to mesne profits or interest which is left to be determined by the Court executing the decree is the question of amount. In *Sadasiva Pillai* v. *Ramalinga Pillai* (2) their Lordships of the Privy Council held that it was the settled law in India that where a decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne profits. In *Fakharuddin Mahomed Ahsan* v. *The Official Trustee of Bengal* (3) their Lordships state (see p. 190) that they "do not feel at all pressed by the authority of several cases to which their attention has been called, the doctrine of which has been affirmed by this Board, namely, that where a decree is silent on the subject of interest or of wasilat, interest or wasilat cannot be added in the course of execution. We are consequently of opinion that as the decree now under execution did not expressly give the appellants mesne profits, they are not entitled to realize them in execution of that decree, and that although they may have made mesne profits a portion of their claim together with recovery of the lands from which they had been unlawfully ejected, the Court executing the decree cannot properly assume that a decree for possession of those lands carries with it the right to obtain the mesne profits claimed in the plaint.

The appellant's pleader next contends that he is entitled to interest on costs in the lower Court, as such were expressly given by the terms of the decree of this Court. But we do not understand the order of the Subordinate Judge to refuse such interest except on the costs given by the Judicial Committee which are not ordered to bear interest. The appeal must therefore be dismissed.

It next becomes necessary to consider the objections raised by the learned Counsel for the respondents to the other portions of

(1) B. L. R., Sup. Vol., 602; 6 W. R., Mis., 109.

(2) L. R., 2. I. A., 219; 15 B. L. R., 383; 24 W. R., 193.

(3) I. L. R., 8 Calc., 178.

the order of the Subordinate Judge. Mr. Woodroffe contends that, inasmuch as the respondents are the sons of Jugodumba and Pudmomoni and the son's son of Sreecoomary (Judoonath, the son of Sreecoomary having died after succeeding to his inheritance and being now represented by his son) these persons cannot be regarded as legal representatives of the original judgment-debtors Jugodumba and Pudmomoni, because they have succeeded, not as heirs of those two ladies, but as heirs of their last male ancestor Raj Chunder. It is further contended that they are liable only to the extent of any property that they might have inherited from those two ladies. But these two ladies Jugodumba and Pudmomoni themselves succeeded by right of inheritance to their father Raj Chunder, and, for all purposes, represented that estate. We further observe that the respondents are still in possession of the lands which were wrongfully taken by Rash Money as included in the decree obtained by Raj Chunder for possession of the mortgaged property after foreclosure. They are not, therefore, in a position to disconnect themselves from the acts of Rash Money under which these lands were taken, and held as a portion of the family estate even at the present day. Under such circumstances, we think that the Subordinate Judge has rightly held that the respondents are the legal representatives of the judgment-debtors, and, as such, are liable to all costs incurred in the suit brought by the plaintiffs.

With reference to the objection that execution cannot proceed against the estate in the hands of the Receiver appointed by an order passed in the Original Side of this Court, we observe that the Receiver in the lower Court expressed his willingness to give up the estate. We think, therefore, that this objection cannot be sustained.

—P. O'K. *Appeal dismissed.*

Before Mr. Justice Ghose and Mr. Justice Porter.

1886 *June* 18.

WAJIBUN AND OTHERS (DEFENDANTS) *v.* KADIR BUKSH (PLAINTIFF).*

Limitation Act (XV of 1877), s. 19—Acknowledgment of debt—Secondary Evidence of Acknowledgment—Authority to bind Minor by acknowledgment.

An original account book containing an acknowledgment of a debt had been filed in Court, and subsequently lost whilst in Court; *held*, that secondary evidence of such acknowledgment might be given, notwithstanding the words of s. 19 of the Limitation Act.

A person merely by reason of being the mother and guardian of a minor has no authority to make an acknowledgment of a debt on behalf of the minor, so as to give a creditor a fresh start for the period of limitation.

THE plaintiff brought this suit on the 4th May 1883 against the heirs of one Syed Abu Syed to recover a sum of Rs. 929-5 on account of goods sold to Syed Abu Syed during his lifetime between the years 1872 and 1879.

He alleged that shortly after the death of Syed Abu Syed, *viz.*, on 1st August 1880, it was agreed amongst the said heirs that 11 annas of the debt was to be paid by the defendant Fusibun (the elder widow) and her children defendants Nos. 1 to 8, and 5 annas by the defendant Wajibun, the younger widow, and her children defendants Nos. 9 to 14, and that on that day accounts were settled and signed by the *ammukhtars* of the widows; and that the book which bore these signatures had been filed in a suit in the Small Cause Court and was not forthcoming.

The elder widow did not appear, and her children through their guardian admitted the plaintiff's claim; the younger widow appeared, and contended that, as the account closed in April 1879, the suit was barred; she admitted the settlement, but denied the *ammukhtar's* power to sign the account for her and her children.

The Munsiff allowed the plaintiff to give secondary evidence of the acknowledgment in the account book, and found that the acknowledgment had been made on the widow's behalf with

* Appeal from Appellate Decree No. 1577 of 1885, against the decree of Baboo Mothura Nath Gupto, Roy Bahadur, Subordinate Judge of Patna, dated the 24th of April 1885, affirming the decree of Moulvi Abdul Bari, Khan Bahadur, B. L., Munsiff of that district, dated the 27th of June 1884.

their authority; he therefore gave the plaintiff a decree against all the defendants, making the estate of the deceased in the respective defendants' hands liable for the debt.

The defendant Wajibun and her children through her appealed to the Subordinate Judge.

The Subordinate Judge found that the accounts had been settled on the 1st August 1880; that they had been duly signed by the widow's *ammukhtars*, and that the Munsiff had rightly allowed secondary evidence of the acknowledgment, the book having been proved to have been lost; he therefore upheld the Munsiff's decree.

The same defendants appealed to the High Court.

Mr. *Abdool Hossein* and Munshi *Serajul Islam* for the appellants contended that the suit was barred; that under s. 19 of the Limitation Act oral evidence of the contents of the so-called acknowledgment should not have been admitted; that the Judge was wrong in giving a decree against the minors, as they could not be bound by the acts of the *ammukhtars*.

Munshi *Mahomed Yusuf* for the respondents contended that the acknowledgment implied a fresh promise, and that limitation would run from that period; that the plaintiff was entitled to recover the whole of the debt from the widow Wajibun who had made herself liable for the whole of the debt by acknowledging it; that under the Mahomedan law the plaintiff might recover the whole of the debt from Wajibun as representative of the deceased.

The judgment of the Court (GHOSE and PORTER, JJ.) was as follows:—

This was a suit to recover from the heirs, other than the mother of one Syed Mahomed Abu Syed, the price of clothes and other articles sold to him by the plaintiff from 1279 F. S. to Bysakh 1286 F. S. The said heirs are: *first*, Mussamut Fusibun, the first widow of Mahomed Abu Syed, the defendant No. 1, and the defendants Nos. 2 to 8, the children of Abu Syed by Fusibun; and *second*, Mussamut Bibi Wajibun, his second widow, the defendant No. 9, and the defendants Nos. 10 to 14, his minor children by Wajibun—the said minors being represented by their mother and natural guardian Wajibun.

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This suit was brought on the 14th of May 1883, that is to say, three years after the transactions of sale; but it was alleged and proved in the opinion of both the lower Courts, that on the 1st of August 1880, the accounts were settled between the plaintiff on the one hand and Mussamut Fusibun and Mussamut Wajibun on the other, and that Rs. 2,555-2 having been found to be due to the plaintiff from the estate of Abu Syed, the sum Rs. 2,129-5-8 was determined as payable by the two sets of defendants, in the proportion of Rs. 1,612-10-10, and Rs. 566-10-10, respectively. This settlement was acknowledged in writing by the two ladies on the accounts, their respective agents authorized in that behalf signing for them.

The plaintiff thereupon contended that the suit having been brought within three years from the said acknowledgment, it was within time.

We ought here to mention that the suit was for the recovery of Rs. 929-5, after giving credit to the defendants for the sums paid by them, and the decree that was awarded by the Courts below was for Rs. 462-10-6, as recoverable from the estate of Abu Syed, in the hands of defendants Nos. 1 to 8, and the sum of Rs. 466-10-6, from that portion of the said estate which was in the hands of defendants Nos. 9 to 14.

The present appeal is by Mussamut Wajibun and her children against that portion of the decree that was awarded against them, and the main contentions that were raised on their behalf before us were: (1) that the acknowledgment signed by the defendants being not forthcoming, no oral evidence should have been received under s. 19 of the Limitation Act, to prove the contents of the said acknowledgment; (2) that the acknowledgment did not bind the minors, and, therefore, so far as they were concerned, no decree ought to have been given against them.

As regards the first contention it appears to us that, although s. 19 of the Limitation Act provides that "when the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but no oral evidence of the contents shall be received," still this was not meant to exclude *secondary*-evidence of the contents of the acknowledgment, under s. 65 of the Evidence Act, when a proper case for

the reception of such evidence is made out, and in this respect we agree in the views so fully expressed in a recent decision by a Divisional Bench of this Court in the case of *Sambhu Nath Nath* (1). In the present case, it has been found that the original account book containing the acknowledgment was filed by the plaintiff in a previous suit between the parties, but has since been lost, and, therefore, it seems to us that it was open to the plaintiff to give secondary evidence of the contents of the said acknowledgment.

As regards the second contention, we are of opinion that the acknowledgment by an agent, authorized in that behalf by Mussamut Wajibun, would not necessarily bind the minors. The mother, in the absence of any special authority being proved to exist in her, cannot be regarded as an agent on the part of the minors duly authorized in that behalf within the meaning of s. 19 of the Limitation Law, and it appears to us that a person, merely by reason of her being the mother and natural guardian, has no authority to make an acknowledgment on behalf of minors so as to give a creditor a fresh start for the period of limitation.

We therefore think that the claim, so far as the minors are concerned, is barred by limitation, it having been brought beyond three years from the original transactions.

It is, however, contended by the learned vakeel for the respondent that the acknowledgment implies a fresh promise, and that, therefore, irrespective of s. 19 of the Limitation Act, the debt is not barred against the minors. But it is quite clear that there was no consideration so far as the minors were concerned, for this fresh promise on the part of the mother, and therefore the said promise by her could not be regarded as an act in the interest of the minors, such as would be binding upon them. Another point was raised by the vakeel for the respondent to the effect that, supposing that the claim could not be maintained against the minors, Mussamut Bibi Wajibun, by reason of her acknowledgment, made herself liable to make good the whole amount, and that therefore the claim ought to be decreed in its entirety against her. But it is obvious that

(1) I. L. R., 12 Calc., 267.

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it was never intended that the said Mussamut should make herself solely responsible for the whole debt; it was never the plaintiff's case that she made herself so liable, nor do we think it would be equitable in the circumstances of this case to make her liable for the whole debt. It was further argued that under the Mahomedan law, it was competent to the plaintiff to realize the whole of his dues from the said Mussamut, she being in possession of the whole estate in a representative capacity. But the answer to this is that, in the first place, it was never the plaintiff's case that the lady was in possession of the whole estate, nor that she was in such possession in a representative capacity. On the contrary, the plaintiff's case is, that upon Abu Syed's death, there was a distribution of the estate among his heirs, and that both the widows and the children were in possession of their respective shares.

We are, therefore, of opinion that in the circumstances of the present case, the plaintiff is not entitled to recover more than a proportionate share of the debt from Mussamut Wajibun, namely, a share proportionate to the assets received by her in the estate of Abu Syed.

The result is that the suit, so far as the minors are concerned, will be dismissed; and that a decree will be passed against Wajibun for Rs. 58-5-3.

This order does not in any way interfere with the decree already passed in plaintiff's favour against the defendants Nos. 1 to 8.

As regards the costs, we are of opinion that Bibi Wajibun, in the circumstances of this case, should pay the plaintiff's costs in this Court and in the lower Courts. We allow no costs to the minors.

T. A. P. *Decree varied.*

Before Mr. Justice Mitter and Mr. Justice Grant.

MODUN MOHUN DUT AND ANOTHER (PLAINTIFFS) *v.* FUTTARUNNISSA AND OTHERS (DEFENDANTS).*

1886 *June* 8.

Transfer of Property Act (IV of 1882), ss. 52, 135—Sale of immoveable property by person out of possession—Actionable claim.

A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession.

A and *B* being owners of an 8-annas share of certain immoveable property sold it under a kobala to *C* and *D*. At the time of the sale *X* and *Y* were in adverse possession of the share. *Held*, that the transaction was a sale under s. 52 of the Transfer of Property Act, to which the provisions of Chapter 8 of the Act, specially those of s. 135, were inapplicable.

Semble, s. 135 refers to claim for money of some kind or the like, although the money claim may be a charge on immoveable property.

THIS was a suit to recover possession of an 8-annas share of 5 kedars and 2 puns of land. The property was originally in the joint possession of four brothers, Jugul, Obhoy, Nil and Puddo. Jugul and Obhoy sold the whole property to Futtarunnissa, and the latter then executed a kobala with respect to the land in dispute in favour of Jogomohun and Ramchunder, the principal defendants, who took possession in Bysack 1287 (April 1880). Nil and Puddo, while thus out of possession, sold their 8-annas share of the land to the plaintiffs under a kobala, dated the 9th Kartick 1291 (24th October 1884.) The defendants contended that the plaintiffs, their vendors being out of possession at the time of the sale, had purchased an actionable claim as defined by s. 130, Act IV of 1882, and were entitled to no more than the amount of consideration-money actually paid by them and the incidental expenses of the sale. The Munsiff, while of opinion that the subject of sale was an actionable claim, decreed the suit in view of cl. (*d*) of s. 135. The Subordinate Judge, differing from the Munsiff in his interpretation of cl. (*d.*), held that the defendants would be exonerated by the

* Appeal from Appellate Decree No. 425 of 1886, against the decree of Baboo Ram Cumar Pal Chowdry, Rai Bahadur, Subordinate Judge of Sylhet, dated the 12th of December 1885, reversing the decree of Baboo Kali Dhun Chatterji, Munsiff of Habigunge, dated the 25th of June 1885.

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payment of the consideration-money and the incidental expenses of sale with interest, and altered the decree accordingly.

On second appeal, it was contended on behalf of the plaintiffs that the transaction between them and their vendors was one of sale under s. 52 of the Transfer of Property Act, to which the provisions of s. 135 were inapplicable.

Baboo *Akhil Chunder Sen* for the appellants.

Baboo *Taruck Nath Pulit* for the respondents.

The judgment of the High Court (MITTER and GRANT, JJ.) was as follows :—

This was a suit to recover possession of an 8-annas share of a certain property. We may take it upon the finding of the lower Courts that the defendants Nos. 6 and 7 had been the owners of this 8-annas share. It is not disputed that the plaintiffs purchased this property under a kobala from the defendants Nos. 6 and 7, and by the terms of that kobala the ownership was transferred to the plaintiffs. It is also not disputed that at the time of the execution of the kobala the defendants Nos. 6 and 7 were not in possession, but that the property in dispute was in the possession of the principal defendants. Upon these facts the question that was raised in the lower Courts, and that has been raised before us, is whether it was a sale of an actionable claim within the meaning of Chapter 8 of the Transfer of Property Act ; and further if it is a sale of an actionable claim, whether s. 135 of that Chapter applies to the present case.

It seems to us that the sale in this case does not come within Chapter 8 of the Transfer of Property Act. Section 130 of the Act says: "A claim which the Civil Courts recognise as affording grounds for relief is actionable whether a suit for its enforcement is or is not actually pending or likely to become necessary." It is therefore evident that it refers to nothing more than to a sale of a claim, but if the transfer be that of the ownership of property it is something more than the transfer of a claim. It is unnecessary for us to define exactly the classes of cases coming within the purview of s. 130 ; all that we decide is that a transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not

be in possession. The Transfer of Property Act is divided into several chapters. Chapter 1 deals with preliminary matters. Chapter 2 deals with general rules relating to the transfer of property. Then from Chapter 3 to Chapter 8 the Act deals with rules of law relating to different kinds of transfer of property. Chapter 3 treats of sales of immoveable property, Chapter 4 deals with mortgages of immoveable property and charges, Chapter 5 with leases of immoveable property, Chapter 6 deals with the subject of exchange, Chapter 7 deals with the subject of gifts, and then comes Chapter 8, which deals with transfers of actionable claims. It is clear from the division of these chapters that it is made with reference to the different classes of transfer, and therefore if a particular transfer comes under one chapter it is necessarily excluded from the other chapters. That being so, it is important to consider whether, under the circumstances stated above, the transaction between the plaintiffs and the defendants Nos. 7 and 8 comes within the definition of a sale of immoveable property; if it does, it appears to us that it would not come under the purview of any of the following chapters, including Chapter 8. The conditions laid down in s. 54, which defines sales of immoveable property are, in our opinion, fulfilled in the transaction in question. It seems to us that under s. 54, a sale by registered kobala is valid, although the owner may not be in possession at the time of the sale. Section 54, para. 2 says: "Such transfer, in the case of tangible immoveable property of the value of Rs. 100 and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument." Para. 3 says: "In the case of tangible immoveable property of a value less than Rs. 100, such transfer may be made either by a registered instrument, or by delivery of the property." Comparing these two paras. it seems to us that where a sale is of tangible immoveable property, whether of the value of Rs. 100 and upwards or not, the transfer is complete when the instrument by which the transfer is made is registered; and delivery of possession in that case is not a condition precedent to the validity of the transfer. That being so, the transaction in this case comes within s. 54, and it follows, therefore, that it does not come within Chapter 8. But even if it be conceded that it is a sale of an

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actionable claim, we think that s. 135 is not applicable. That section says that, "where an actionable claim is sold, he, against whom it is made, is wholly discharged by paying to the buyer the incidental expenses," &c. The word *discharged* would be inapplicable to a suit of this description, because it is for possession of land. We are inclined to think that s. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. On the whole, we are of opinion that Chapter 8, and specially s. 135, are not applicable to the facts of this case. That being so, the right of the plaintiffs being found in the judgment of the lower Courts, the decree of the lower Appellate Court will be set aside, and the plaintiffs' suit for possession will be decreed with costs in all the Courts.

K. C. M. *Appeal allowed.*

Before Mr. Justice Norris and Mr. Justice O'Kinealy.

1886. *August* 3.

BROJENDRO KUMAR ROY CHOWDHRY (PLAINTIFF) *v.* RASH BEHARI ROY CHOWDHRY AND OTHERS (DEFENDANTS).*

Right of suit—Cause of Action—Contribution, suit for—Joint wrong-doers—Breach of Covenant—Damages for breach of Contract—Breach of Contract.

In a suit for damages against *A* and others for breach of a covenant not to open a ferry at a particular place, a decree was obtained against all the defendants. The amount of this decree was levied by execution from *A* alone, who thereupon brought a suit for contribution against his co-defendants in the former suit. Both the lower Courts dismissed the suit on the ground that the plaintiff and the defendants had been joint wrong-doers, and that no suit for contribution would lie as between them. On second appeal to the High Court—

Held, that the rule of law relied on by the Courts below had no application to the circumstances of the present case, and that the plaintiff was entitled to maintain his action.

IN this case it appeared that a decree had been obtained by one Bhogowan Chunder Chowdhry against the plaintiff and the defendants jointly for the sum of Rs. 352-14-0 as damages for breach of contract. The whole amount was, in execution of the

* Appeal from Appellate Decree No. 1555 of 1885, against the decree of W. H. Page, Esq., Judge of Dacca, dated the 20th of April 1885, affirming the decree of Baboo Mohendro Nath Das, Munsiff of Manikgunj, dated the 18th of February 1884.

decree, recovered from the plaintiff alone on the 2nd of March 1881; and thereafter he, on the 24th of August 1883, instituted the present suit for contribution. The Court of first instance held that the plaintiff and the defendants had been joint wrong-doers in breaking the contract upon which Bhogowan Chunder Chowdhry sued, and that therefore the present suit for contribution would not lie—*Sreeputty Roy* v. *Lohâram Roy* (1); *Suput Singh* v. *Imrit Tewari* (2); *Ruttee Sirdâr* v. *Sajoo Paramanick* (3). The judgment of the lower Appellate Court on appeal is as follows:—

"I think that the judgment of the lower Court ought to be supported for the reasons given by the Munsiff. The defendants in the former suit executed an agreement not to open a ferry in the neighbourhood of a certain existing ferry and did so open a ferry in violation of the agreement. It seems to me that this constituted them wrong-doers in the sense that they knew or ought to have known that they were doing a wrong or unlawful act. I do not think it can be said at all that they were acting under a claim of right, however ill-founded; the act was a deliberate breach of the agreement into which they had entered, and therefore the Munsiff has rightly held that no suit for contribution would lie. The appeals are dismissed with costs."

The plaintiff appealed to the High Court. The facts of the case are fully set out in the judgment of Mr. Justice Norris.

Dr. *Rash Behary Ghose*, Baboo *Srinath Das*, and Baboo *Kali Charan Banerjee* for the appellant.

Baboo *Hem Chunder Banerjee*, Baboo *Sharoda Churn Mitter* and Baboo *Turuck Nath Paulit* for the respondents.

The following judgments were delivered by the Court (NORRIS and O'KINEALY, JJ.)

NORRIS, J.—The facts of this case are shortly as follows:—The predecessor of one Bhogowan Chunder Roy granted a miras settlement of certain lands in Kaunnara to the plaintiff and certain of the defendants. The ekrar contained a covenant by

(1) 7 W. R., 384.
(2) I. L. R., 5 Calc., 720.
(3) 11 B. L. R., 345; 20 W. R., 236.

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the grantees of the settlement not to interfere with or disturb a ferry ghât belonging to the grantor. In breach of this covenant the grantees established a ferry ghât near that of the grantor, who thereupon brought an action against the grantees for breach of covenant and obtained a decree. In execution of his decree the grantor attached certain property of the plaintiff, who, to avoid the sale of his property, satisfied the decree by paying the damages and costs amounting to Rs. 352-14.

The plaintiff's share in the maliki rights under the settlement was four annas, and he admitted that he was liable for ¼th of the Rs. 352-14, one of his co-sharers paid him Rs. 24 odd in respect of his 1a-2g-2k share, and the plaintiff brought this suit to recover the balance with interest from the surviving co-grantees, and the heirs and representatives of some who had died, according to their respective shares. The defendants 1, 4, 5, 6, 7, 8, 9, 10 and 13 did not appear. The defendants 2, 3, 11, 12 and 14 jointly filed a written statement; the defendant 15 filed a separate written statement; the defendants 16, 17 and 18 jointly filed a written statement. The Munsiff dismissed the suit as against all the defendants, holding that they were all wrong-doers, and that no suit for contribution lay, and upon the merits he dismissed the suit as against the defendants 10, 12, 14, and 15; he also held that the defendants 1, 2 and 3 were not liable for the costs of the appeals preferred to the lower Appellate Court and the High Court against the decree of the Munsiff awarding damages to the grantor. On appeal the District Judge upheld the Munsiff's decision, and from his judgment the plaintiff has appealed to this Court.

The Munsiff found "that the plaintiff and defendants made a conspiracy and opened a ferry ghât in violation of an agreement made by them in favour of the plaintiff in the damage suit, and it is clear that they knew that they were doing an illegal or wrong act; for this reason I hold that this suit is not tenable."

The District Judge says: "The defendants in the former suit executed an agreement not to open a ferry in the neighbourhood of a certain existing ferry, and did so open a ferry in violation of the agreement; it seems to me that this constituted them wrong-doers in the sense that they knew or ought to have known that

they were doing a wrong or unlawful act. I do not think it can be said at all that they were acting under a claim of right; however ill-founded, the act was a deliberate breach of the agreement into which they had entered." I am of opinion that both the Courts below have erred in treating the plaintiff and defendants as wrong-doers, and in their application of the well-known legal maxim that no contribution lies amongst wrong-doers. When the Munsiff speaks of a conspiracy the utmost that he can mean is that the plaintiff and defendants met together and deliberately agreed to break their covenant and establish a ferry ghât. This is not sufficient to constitute a conspiracy. To constitute a conspiracy there must be an agreement between two or more persons to do something either *malum prohibitum* or *malum in se*, or to do something which they are entitled to do only by illegal means. Suppose *A*, *B*, and *C* contract to deliver to *D* in Calcutta, on 1st January, 1,000 maunds of wheat at a certain price, and between the date of the contract and the date of delivery wheat has gone up in price, and *A*, *B*, and *C* meet together and say "we shall lose a lot of money on this contract, let us only deliver 500 maunds and leave *D* to sue us for damages." Could this be said to be a conspiracy? I think not; or suppose *A* and *B* agree to sell a piece of land to *C*, and between the date of the contract and the date fixed for the completion of the purchase, *A* and *B* hear that the piece of land is likely to be taken up for a railway or other public work, and that therefore they will in all probability get a much better price than *C* had agreed to give them, and agree not to convey to *C*, but to leave him to bring his action for damages; this would not be conspiracy. Three cases were relied upon by the Munsiff, *viz.*, *Sreeputty Roy* v. *Loharam Roy* (1); *Ruttee Sirdar* v. *Sajoo Paramanick* (2); and *Suput Singh* v. *Imrit Tewari* (3); all these cases are cases of tort. Here the plaintiff and defendants were guilty only of a breach of contract. The leading case of *Merryweather* v. *Nixon* (4) points out the distinction between contribution as between joint tort feasors and judgment against

(1) 7 W. R., 384.
(2) 11 B. L. R., 345; 20 W. R., 236.
(3) I. L. R., 5 Calc., 720
(4) 2 Smith's L. C., 546.

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several defendants in an action of assumpsit: I am of opinion that the appeal should be allowed.

As the lower Appellate Court has not tried the case on the merits, it must be remanded to enable it to do so. Costs will abide the result.

O'KINEALY, J.—I concur in the decision of my learned colleague. The Judge below finds and only finds that the defendants in the former suit violated their agreement, not that they had committed a wrong independently of contract. This finding does not prevent the present suit. See *Power* v. *Hoerz* (1).

P. O'K. *Appeal allowed and case remanded.*

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Beverley.

1886 *August 3.*

IN THE MATTER OF KALA CHAND AND OTHERS (PETITIONERS) *v.* GUDADHUR BISWAS AND OTHERS (OPPOSITE PARTIES)*

Compensation—Cattle Trespass Act, 1871, *ss.* 20, 22—*False complaint.*

A complaint was made against certain persons under s. 20 of the Cattle Trespass Act of 1871, charging them with having illegally seized and detained the complainant's cattle. The Assistant Magistrate who heard the complaint found it to be false, and he ordered the complainant to pay Rs. 20 compensation to the accused, and in default to suffer simple imprisonment for 21 days. On application to the High Court,—

Held, that the order was illegal and must be set aside.

IN this case Kala Chand Sheikh and others charged Gudadhur Biswas and others, under the provisions of s. 20 of the Cattle Trespass Act, Act I of 1871, before the Assistant Magistrate of Meherpore, with having illegally seized and detained their cattle. The complaint was investigated by the Assistant Magistrate and found to be false. He acquitted the accused under s. 245 of the Code of Criminal Procedure. He directed that each of the complainants should pay to the accused

* Criminal Revision Case No. 313 of 1886, against the order passed by Mr. J. Crawfurd, Sessions Judge of Nuddea, dated the 5th June 1886, rejecting the order of Mr. Hewling Luson, Assistant Magistrate of Meherpore, dated the 9th April 1886.

(1) 19 W. R. (Eng.) 916.

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The District Magistrate was of opinion that the offence was one properly punishable under s. 420 of the Penal Code, and one which the Assistant Magistrate had no jurisdiction to deal with, and that therefore the reference under s. 349 was *ultra vires* and illegal. On a reference to the High Court:

Held, that the Assistant Magistrate was not wholly without jurisdiction, as he was competent to commit the accused to the Court of Sessions, though not to hold a trial, and that the District Magistrate might, if he thought proper, commit the accused to the Court of Sessions.

THIS was a reference to the High Court by the District Magistrate of Patna, under the provisions of s. 438 of the Code of Criminal Procedure. The terms of the reference are as follows:—

"This case was tried by the Assistant Magistrate of Behar, who found the accused person guilty of offences under ss. 417 and 406 of the Penal Code and forwarded her with the proceedings in the case to the District Magistrate in order that a more severe punishment might be imposed than the Assistant Magistrate, who has the powers of a Magistrate of the second class, is empowered to inflict.

"The charge against the accused is that she dishonestly induced the complainant Mussammat Baharun to make over to her cash and ornaments of considerable value by pretending that she could get a charm worked upon them which would have the effect of enabling the owner to rear healthy children. I think it is quite clear that if the accused has committed any offence, it is an offence punishable under s. 420 of the Penal Code, which a second class Magistrate is not competent to try, the delivery of the property being of the very essence of the offence, and that the Assistant Magistrate could not give himself jurisdiction by reducing the offence to one of ordinary cheating under s. 417 of the Penal Code.

"Section 349 of the Criminal Procedure Code only applies to cases dealt with by a Magistrate 'having jurisdiction,' which evidently means jurisdiction to try the case, and as the Assistant Magistrate had not such jurisdiction, his proceedings, so far as the framing of the charge and the reference made under s. 349 of the Criminal Procedure Code are concerned were *ultra vires* and illegal.

"Under these circumstances, I am doubtful whether I can legally deal with the case either by myself, trying the accused for an offence under s. 420 of the Penal Code, or by committing her for

Rs. 20, and in default of paying the fines that they should suffer simple imprisonment for 21 days (s. 250 of the Code of Criminal Procedure), and he sanctioned the prosecution of the complainants and their witnesses for instituting a false case and for perjury.

The District and Sessions Judge of Nuddea quashed that portion of the Magistrate's order granting sanction to prosecute, but he declined to interfere with that portion of the order which awarded compensation to the accused. Kala Chand Sheikh and the other complainants then presented a petition to the High Court, praying that the order of the Assistant Magistrate awarding compensation should be set aside as illegal, and made without jurisdiction, on the ground, amongst others, that charging a person falsely with illegally seizing and detaining cattle under s. 20 of the Cattle Trespass Act is not an offence.

Baboo *Jushoda Nund Pramanik*, and Baboo *Doorga Doss Dutt* for the petitioners.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

For the reasons given in the case of *Pitchi* v. *Aukappa* (1), in which we concur, the award of compensation under s. 250 of the Criminal Procedure Code, ordered by the Magistrate to be paid by the petitioner in consequence of his having made a frivolous and vexatious complaint of illegal seizure of his cattle, must be set aside, and the fine, if paid, must be refunded.

P. O'K.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

ABDUL WAHAB (COMPLAINANT) *v.* CHANDIA (ACCUSED.)*

1886
August 17.

Magistrate, Jurisdiction of—Powers of Second Class Magistrates—Reference to District Magistrate—Committal to Court of Sessions—Criminal Procedure Code, s. 239.

An Assistant Magistrate convicted a person under ss. 406 and 417 of the Penal Code, and referred the case to the District Magistrate for sentence under the provisions of s. 349 of the Code of Criminal Procedure.

* Criminal Reference No. 147 of 1886, made by C. C. Quince, Esq., Magistrate of Patna, dated the 21st of July 1886.

(1). I. L. R., 9 Mad., 102.

trial to the Court of Sessions, inasmuch as, according to my view, the case has not been legally brought before me for disposal. I therefore solicit the orders of the Court, and would recommend that the charge framed by the Assistant Magistrate and the final order passed by him be set aside, and that he be directed to commit the accused person for trial to the Court of Sessions, the offence being a serious one, and being punishable with imprisonment for seven years.

"Before making this reference I gave the Assistant Magistrate the opportunity of justifying his order, but he states that he has no remarks or explanation to offer, and refers to the order itself as containing the grounds on which it was passed."

No one appeared on the reference.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

This case has been referred to the District Magistrate under s. 349 of the Code of Criminal Procedure by the Assistant Magistrate who exercises powers of the second class, and has found the accused guilty under ss. 406, 417 of the Penal Code, the sentence which he can pass being in his opinion inadequate. The District Magistrate is of opinion that the offence committed is under s. 420 of the Penal Code, which is an offence beyond the jurisdiction of the Assistant Magistrate to try.

Section 349 of the Code of Criminal Procedure empowers the District Magistrate to pass such judgment, sentence or order in the case as he thinks fit, and as is "according to law." Now, although the Assistant Magistrate was not competent to hold a trial of an offence under s. 420 of the Penal Code, he was competent to hold an inquiry, and commit to the Court of Sessions, so that he was not entirely without jurisdiction, and could have committed the case instead of referring it to the District Magistrate. The District Magistrate is moreover competent, in a case of this description, to pass such order as he thinks fit, and as is according to law, and he can consequently, if he thinks proper, commit the accused to the Court of Sessions. We may refer the District Magistrate to the cases of *In the matter of Chinnimarigadu* (1); and *Imperatrix* v. *Abdulla* (2).

P. O'K.

(1) I. L. R., 1 Mad., 289. (2) I. L. R., 4 Bom., 240.

PRIVY COUNCIL.

P. C.*
1886
March 19, 23, 24, 25 *and* 26.
April 9.

JAGADAMBA CHAODHRANI AND ANOTHER (PLAINTIFFS) *v.* DAKHINA MOHUN ROY CHAODHRI AND OTHERS (DEFENDANTS).

SARODA MOHUN ROY CHAODHRI (PLAINTIFF) *v.* DAKHINA MOHUN ROY CHAODHRI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Limitation Act (IX of 1871), *Sch. II, Art.* 129—*Meaning of "suit to set aside adoption."*

Art. 129 of Sch. II of Act IX of 1871, the Indian Limitation Act of that year, using the expression "suit to set aside an adoption," denoted a suit bringing the validity of an adoption into question; and the rule of limitation, given by that Article, applied to all suits in which the suitor could not succeed without displacing an apparent adoption, in virtue of which the opposite party was in possession.

The plaintiffs, as collateral heirs of a childless Hindu, questioned adoptions purporting to have been made by his widows in pursuance of authority from him; such adoptions having been followed by continuous possession, and having been recognized in formal instruments, proceedings, and decrees to which the plaintiffs were parties. *Held*, on the ground that the adoptions were brought into question more than twelve years after their date, though less than twelve years after the plaintiffs' titles (if any) had accrued at the death of the surviving widow, that the suits were barred under Art. 129 of Sch. II of Act IX of 1871.

Part of the language of the judgment in *Raja Bahadur Singh* v. *Achumbit Lall* (1) referred to, and that case, in which the plaintiffs' claim was not affected by the widow's adoption, distinguished from the present.

CONSOLIDATED appeals from two decrees (25th March 1882) of the High Court, reversing two decrees (5th October 1877) of the Subordinate Judge of Rangpur.

The suits giving rise to these appeals, brought by collateral relations by adoption, alleging title to the possession of the estate of a childless Hindu on his decease, questioned the validity of adoptions made by the widows of the deceased. Limitation under Art. 129 of Schedule II of Act IX of 1871, the Indian Limitation Act then in force (2), was the ground, amongst

* *Present*: LORD BLACKBURN, LORD HOBHOUSE, and SIR R. COUCH.

(1) L. R., 6 Ind. Ap., 110.

(2) That Art. 129 enacted the following rule of limitation: "To establish or set aside an adoption—twelve years from the date of the

other grounds, including Art. 143 of the Second Schedule of the same Act, of the dismissal of the suits in the Court of first instance. In regard to such other grounds, without special reference to Art. 129, which related to adoptions, but viewing the effect of Art. 143, which related to suits generally, for the possession of immoveables, differently from the first Court, the High Court reversed the decisions of the lower Court, and decreed the claims. The application, however, of Art. 129 was again raised as a principal question on the present proceedings, and that Article having been held to apply, no other question for decision remained.

Three brothers, sons of Anand Mohun Chaodhri, *viz.*, Kali Mohun Chaodhri, who died in 1856, Tarini Mohun, who died in 1833, and Hurro Mohun, who died in 1846, being without sons, all of them either adopted or gave to their widows authority to adopt.

Dakhina Mohun, the adopted son of the first of the above, and Tara Mohun, the adopted son of the second, separately brought the suits out of which the present appeals arose, each claiming to be an heir of Hurro Mohun, brother of their respective adoptive fathers.

The object of both suits was the same—to oust, as having no title to Hurro Mohun's estate as against his collateral heirs, the defendant Saroda Mohun, and for the same reason, the defendants Jagadamba, the widow, and Jotindro Mohun, the minor son of Durga Mohun, deceased, alleging that the adoptions, under which the latter and Saroda Mohun had got possession of Hurro Mohun's estate between them, were unauthorized and invalid.

For the defence it was set up that the adoption of Saroda Mohun

adoption, or at the option of the plaintiff the date of the death of the adoptive father."

Art. 143 enacted: "For possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession—twelve years from the date of the dispossession or discontinuance."

Art. 118 of the Second Schedule of Act XV of 1877: "To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place—twelve years from the time when the alleged adoption becomes known to the plaintiff."

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had been validly made in 1853 by the elder widow Radha Sundari, who died in 1868, and that the younger widow, Hurripria, who died in 1864, had duly adopted Durga Mohun in 1856. The sons so adopted had agreed on coming of age to raise no question as to which was the valid adoption; and held on the footing that, whichever of the two was entitled allowed the other to possess half the estate. They also relied upon limitation under Act IX of 1871, Art. 129 and 143 of Schedule II. The first suit was brought by Tara Mohun since deceased, and now represented by Annoda Mohun his son in April 1873, for one half of Hurro Mohun's estate, allowing that Dakhina Mohun was entitled to the other. The second suit was brought more than a year later by Dakhina Mohun for the entire estate. He, however, afterwards admitted, while the appeals were pending in the High Court, what had been done in regard to the adoption of Tara Mohun.

The Subordinate Judge of Rangpur, Baboo Bhagwan Chandro Chakerbatti, dismissed both suits as barred under Art. 129. He was also of opinion that both suits were barred under Art. 143. He further found that the adoptions, impugned by the plaintiffs, were good and valid. In regard to Art. 129, he was of opinion that the suits were in effect to set aside adoptions, as by that means alone could the defendants' titles be defeated; and he referred to *Siddhessur Dutt* v. *Sham Chand Nundun* (1) as showing that the alternative period, *viz.*, the date of the death of the adoptive father, from which a plaintiff might count the twelve years' bar, could not be construed to mean the date of the adoptive mother's death. In regard to s. 143, he found that no one through whom the plaintiffs claimed, had been in possession within the twelve years preceding the claim. The widows' possession had been discontinued; and it was on behalf of the defendants, during their minority, that possession had been held. Hurro Mohun dying in 1253, left an instrument termed *adhyakhyanama*, or document as to the holding possession of the property, whereby he appointed trustees to be *adhyakhyara*, or holders of the property in trust for each son as might be adopted to him, under the *anumatipatro* to the

(1) 15 B. L. R., 9 : 23 W. R., 285.

widows, which he executed on the same date. The effect of this was, in the Subordinate Judge's opinion, practically to disinherit the widows. The above trustees were in possession for about a year, and then, in consequence of disputes with the widows, they relinquished the trust, the widows' names being entered in the Collectorate records. The latter state of things continued for about five years. In 1259 (1852), from which date the possession on behalf of any one claiming through the widows' late husband must have ceased, a manager, appointed on behalf of an adopted son (other than the present defendants, and since deceased;) was placed in possession of the property now in dispute. Thus there was, in fact, a possession adverse to the present plaintiffs. For these reasons he dismissed their claims.

The plaintiffs severally appealed to the High Court, and a Divisional Bench (MORRIS and PRINSEP, JJ.) reversed the above decision, for reasons given as follows :

" As regards the plea that the suits are barred by limitation, we would merely remark that the general rule in all cases of this description, brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow, is, that limitation is calculated from the time when the title of the reversionary heir accrues on the death of the Hindu widow. That was admitted to be settled law in the case, before the Privy Council, of *Rajendro Lall Holdar* v. *Jogendro Nath Bonnerjee* (1), and the law has since remained unaltered.

" It has, however, been contended before us, as in the lower Court, that the widows never had possession on their own account, but that on the death of Hurro Mohun, and subsequently, his estate has been held on titles adverse to those of the widows, and that, therefore, their titles, as well as those derived by the ordinary right of inheritance from Hurro Mohun, are barred.

" We cannot accept this view of the case. At Hurro Mohun's death, in accordance with the *adhyakhyanama*, the names of the managers or trustees appointed by him were duly recorded in the Collector's register with those of the widows. The power

(1) 14 Moore's I. A., 67 : 7 B. L. R., 216.

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of the widows was, no doubt, limited by that deed; but there was nothing in the deed itself which did or could disinherit the widows or confer on any one a title adverse to them. There was conferred on them the power to adopt, and the 'managers' were directed to hold on behalf of sons to be adopted; but that did not the less vest the estate in the widows until they had adopted. If they never exercised the power of adoption, [and we may observe that they could not be compelled to adopt—*Pearee Dayee* v. *Hurbunsee Kooer* (1); *Bamun Das Mookerjee* v. *Mussummat Tarini* (2)], the managers would be relieved of their duty unless they were acting for the widows. The Subordinate Judge is wrong in stating that the widows were disinherited. That could not be, except in favor of some living being. They could not be disinherited in favor of some one whom they might never call into existence. The fact, too, that the widows were registered with the managers as proprietors of the estates, shows that they were regarded, not only as joint proprietors, but as in joint possession. Next, if we look to the evidence, we find that very shortly afterwards, the widows succeeded in getting rid of the managers, and were recorded not only as sole proprietors, but in sole possession on their own account; and this is remarkable, because at that time they had exercised the power to adopt and had begun to dispute with one another regarding their relative rights in this respect. Under such circumstances, we cannot agree with the lower Court that the suits are barred by limitation, inasmuch as they have been brought within twelve years from the death of Radha Sundari, the elder widow, who survived Hurripria, the younger."

As to the validity of the adoptions in question, the High Court held that, though a power to adopt had been given, and adoptions had been made, or purported to have been made under it, the power had not been exercised in the manner directed in it, and that the adoptions were, therefore, bad.

The respondents Dakhina Mohun and Annoda Mohun accordingly, obtained decrees against Saroda Mohun, and the son and widow of Durga Mohun, for possession of the estate.

(1) 19 W. R., 127. (2) 7 Moore's I. A., 190.

On the appeals of the defendants, which separately filed in the two suits were four in number, and were consolidated by an order in Council (15th November 1884), Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the appellants, contended that the High Court had disregarded the law of limitation. Art. 129 of Sch. II. of Act IX of 1871 was applicable to the suits, which were in substance "to set aside adoptions" within its meaning. If recognized—and as to this the appellants had a good case on the merits—the adoptions could not fail to carry the title to the estate with them; and therefore these suits, though suits for possession, were in effect suits to set them aside. However inaccurate the expression might be, it was always used to signify not only a question of the validity of an adoption, but a dispute as to its having taken place. In connection with this, reference was made to *Bhyrub Chunder Chowdhree* v. *Kalee Kishwar Raee* (1); *Govind Kishore Roy* v. *Radha Madhab Adheekaree* (2); *Sooburnomonee Dabea* v. *Petumber Dobey* (3); *Radha Kissoree Dossee* v. *Gutheekissen Sircar* (4); *Radhakissen Mahapater* v. *Sreekissen Mahapater* (5); *Jogendro Nath Banerjee* v. *Rajendernath Holdar* (6); *Srinath Gangopadhya* v. *Moheschandra Roy* (7); *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea* (8); *Siddhessur Dutt* v. *Sham Chand Nundun* (9); *Raj Bahadur Singh* v. *Achumbit Lal* (10); *Gopalayyan* v. *Raghupatiayyan* (11) *Sadashiv Moreshvar Ghate* v. *Hari Moreshvar Ghate* (12).

As regards Art. 143, and the question of possession, the evidence showed that, after Hurro Mohun's death, the estate vested in the managers, and that there had been a possession adverse to those through whom the plaintiffs claimed for more than twelve years before these suits were brought. There was a possession adverse to the widows, who represented their husband's estate; and it was adverse to them whether the adoptions were valid or invalid. If valid, the adopted sons were in possession

(1) S. D. A., 1850, p. 369.
(2) S. D. A., 1856, p. 450.
(3) Marsh., 221.
(4) W. R., 1864, p. 272.
(5) 1 W. R., 62.
(6) 7 W. R., 357, and on appeal 14 Moore's I. A., 67.
(7) 4 B. L. R., F. B., 3.
(8) 15 B. L. R., 1.
(9) 15 B. L. R., 9: 23 W. R., 285.
(10) L. R., 6 I. A., 110.
(11) 7 Mad. H. C., 250.
(12) 11 Bom. H. C., 190.

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as of right; if invalid, their possession, being under supposed right, was none the less adverse to the widows representing the family inheritance. Moreover, in consequence of the adoptions, and what followed them, both the widows themselves were barred under Art. 143: representing, then, as they did, the whole estate, there was nothing left for the present claimants to inherit. A valid adoption, if made, swept away the estate in remainder; if invalid, the adverse possession was equally subsisting, and upon it limitation operated to bar the claims of others. If a widow exercised an authority to adopt, given to her by her husband, so long as the adoption made by her was recognized, there was a possession adverse to other claimants, the possession being on behalf of the adopted son. A suit whether by her, or by the heirs in remainder, if they chose to claim, the widow representing the entire estate for these purposes, must be brought within twelve years from the commencement of the adverse possession. This had been decided in India, and approved by this Committee. Reference was made to *Nobinchunder Chuckerbutty* v. *Issur Chunder Chuckerbutty* (1); *Amirtolal Bose* v. *Rajonikant Mitter* (2); *Srinath Kur* v. *Prosunno Kumar Ghose* (3); *Saroda Sundury Dossee* v. *Doyamoyee Dossee* (4).

It was also argued that, inasmuch as under the law of Regulation III of 1793, a title by non-claim accrued to the possessor, after twelve years' adverse possession, so also under the subsequent enactments not only was a suit against him barred, but his title was good against all other titles—*Doe d. Sib Chunder Doss* v. *Sib Kissen Bonnerjee* (5). This remained unaltered under the law of Act XIV of 1859, s. 1, cl. 12. Nor was it altered by the subsequent enactment of Act IX of 1871, at a time when the adopted sons had in this case acquired titles. The latter was a remedial Act, not intended to affect, or interfere with, titles already acquired by prescription at the time when it came into operation. In regard to the operation of Act IX of

(1) B. L. R., Sup. Vol. 1008: 9 W. R., 505.
(2) 15 B. L. R., 10; 23 W. R., 214; L. R., 2 I. A., 113.
(3) I. L. R., 9 Calc., 934.
(4) I. L. R., 5 Calc., 938.
(5) 1 Boulnois, 70.

1871 upon titles subsisting previously to its enactment, see *Rajrup Koer* v. *Abul Hossein* (1).

Mr. *T. H. Cowie, Q.C.*, and Mr. *H. Cowell*, for the respondents, argued that the suits were not barred, either by the law of Art. 129, or Art. 143. As regards Art. 129 the suits were neither in form, nor in substance, to set aside adoptions. The cause of action in these claims for possession did not accrue till the death of the surviving widow; and, though a suit for a declaratory decree, which it was discretionary with the Court to entertain or not, might have been open to the respondents within the period prescribed by s. 129, and would now be barred, the direct object of the present suits was not to set aside the adoptions. Their direct object was to set forth a title showing a right to the immediate possession of Hurro Mohun's estate. If the defence set up adoptions it would be incident to the case that the question of the adoptions should be tried; but this question was one which the defence brought up. To allow that the adoptions were, or might be, effective as family acts, insufficient, however, to defeat the rights of the respondents, was entirely consistent with the claims made by the latter. Limitation under Art. 129 must, if it applied at all, be applied to the commencement of the suit; and in the claim made by the plaint, irrespectively of what was put forward for the defence, the right to the proprietary possession was all that was set forth; it being all that was necessary to the plaintiffs' case. There were in effect two tests that could be applied, in order to ascertain whether a suit was, or was not, a suit within Art. 129. The first was, what was the nature of the decree asked for, or made? In this case it was a decree for possession of the property claimed, without reference to the subject of adoption. The second test was, who would be entitled to succeed if no evidence was taken. Now, in this case, the title of the respondents, *primâ facie* good, was attempted to be met by the alleged adoptions, which had to be established by the appellants. Reference was made to *Srinath Gangopadhya* v. *Moheschandra Roy* (2); *Gopal Chunder*

(1) I. L. R., 6 Calc., 394; L. R., 7 I. A., 240.
(2) 4 B. L. R., F. B., 3.

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Mitter v. *Mohes Chunder Boral* (1); *Jogendra Nath Banerjee* v. *Rajender Nath Holdar* (2).

It was further contended that the observations in the judgment in *Raj Bahadoor Singh* v. *Achambit Lal* (3), were clearly in point and binding.

In reference to the argument for the appellants upon Art. 143 of the Second Schedule, upon the evidence, no adverse possession for twelve years had been shown; and this became clear when the position of the manager, appointed by the Court, was considered. His possession was not on behalf of the sons alleged to have been adopted; but was on behalf of the person, or persons, legally entitled, to whom, according to the judgment of this Committee in *Rao Karan Singh* v. *Raja Bakar Ali Khan* (4), such a possession could not be adverse.

Mr. *R. V. Doyne* replied.

On a subsequent day, April 9th, their Lordships' judgment was delivered by

LORD HOBHOUSE.—Their Lordships have upon consideration found themselves able to dispose of these appeals upon one of the questions which were argued at the Bar very fully, and with great learning and ability with reference to the law of limitation. And though the cases, which embrace many complicated issues, are very voluminous, the facts material for this decision are few and simple.

Hurro Mohun died childless in April 1846, leaving two widows. That he had given them permission to adopt sons is clear; but in what order of priority the permission was given is one of the many points in dispute. What happened was that each of the widows adopted a son who died, and afterwards each of them adopted another. Of course both adoptions could not be valid though both might be invalid, as the plaintiffs contend they were. But during the minority of the adopted sons both were treated as adopted, and after they they attained age they agreed to raise no question as between themselves, but to enjoy Hurro Mohun's pro-

(1) I. L. R., 9 Calc., 320.

(2) 7 W. R., 357, and on appeal 14 Moore's I. A., 67.

(3) L. R., 6 I. A., 110.

(4) I. L. R., 5 All., 1 : L. R., 9 I. A., 99.

perty in equal shares. If therefore either of the adoptions was valid, both of the adopted sons were safe in their possession.

The plaintiffs in the suits are the persons who, failing adoption, were the heirs of Hurro Mohun at the death of his surviving widow. One suit was instituted by one heir in April 1873, the other by the other heir in August 1874. The defendant Saroda was adopted in December 1853; the defendant Jagadamba is the widow of Durga, who was adopted in August 1856. The surviving widow, Radha Sundari by name, died in July 1868. It thus appears that the earliest suit was brought 18 years after the latest adoption, and the latest suit a little less than six years after the death of the surviving widow.

The Limitation Act in force when these suits were commenced is Act IX of 1871, and it is on the construction of that Act that the question depends. The suits may possibly be considered as falling under one of three articles. They may be considered as suits to set aside an adoption (Art. 129), or as suits for possession of immoveable property by Hindus entitled to possession on the death of a Hindu widow (Art. 142), or as suits for possession of immoveable property not otherwise specially provided for in the Act (Art. 145).

The Subordinate Judge of Rangpur who heard the suits in the first instance dismissed them with costs. He decided for the defendants, not only on the ground that one of the adoptions was valid, but also on the ground of limitation. His opinion is found in the Record thus expressed, probably with some inaccuracy in the transcription:

"The plaintiffs, although they have only sued for possession of the property as heirs-at-law of their deceased uncle Hurro Mohun Chaodhri, but as a fact apparent in itself they cannot likely succeed unless and until the adoptions of Saroda Mohun and Durga Mohun be set aside, making the way plain and smooth for the plaintiffs to enter into possession as heirs of Hurro Mohun Chaodhri. The formation of the plaints can render no advantage to the plaintiffs. Whatever terms they might have used in framing the plaints and the consequential relief sought for, they are in effect suits to set aside the adoptions, and should have therefore been brought within the time allowed by law, to be reckoned from the dates of the successive adoptions."

That is a clear statement of reasons for thinking that the suits fall under Art. 129, and are therefore each barred by the lapse

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of 12 years from the date of the adoption which it seeks to set aside.

The High Court reversed the decision of the Subordinate Judge, and gave the plaintiffs the decree they asked for. On the issue of limitation they say :—

"As regards the plea that the suits are barred by limitation, we would merely remark that the general rule in all cases of this description brought by a reversionary heir to recover possession of family property from one who sets up a title on adoption by a Hindu widow is that limitation is calculated from the time when the title of the reversionary heir accrues on the death of the Hindu widow."

They do not appear to have addressed themselves to the question whether or no Art. 129 governs the case.

The plaintiffs' Counsel have contended that the case falls under Art. 142, or if not, that it is not specifically provided for, and so falls within Art. 145, and that in either case time runs against them only from the death of Radha Sundari. The endeavour to apply those Articles raises several difficult questions of fact and law, but it is not necessary to pronounce any opinion on them if Art. 129 applies to the suits and raises a bar which in each suit is 12 years after the adoption.

It is ingeniously argued for the plaintiffs that they are suing not to set aside any adoption, but to recover possession on their *primâ facie* title as heirs, that it is the defendants who have to allege and prove adoption, and that, on their failure to do so, it will not be set aside, but taken as never having existed. But the answer is that the defendants are in possession in the character of adopted sons; the *primâ facie* title is with them, and until that is displaced they ought to retain their possession. It may not make any difference in law, but it does so happen in this case that the plaintiffs have recognized the adoptees as such for many years in formal instruments and proceedings, and even that parts of the property now sued for have been recovered from the plaintiffs in suits instituted on behalf of the adopted sons by the manager of their estate during their minority. Indeed in one of the present suits the plaintiff tells the story of the adoptions, and directly impeaches their validity. In the other the plaint is silent on that point. But whatever the mode of pleading, there is but one issue on the merits of

the case, namely, the validity or invalidity of the adoptions, by virtue of which alone the defendants hold their property. If the validity is proved, the plaintiffs cannot succeed in their claim. Now Art. 129 of the Limitation Act provides that, for a suit to establish or set aside an adoption, the period of limitation shall be either the date of the adoption or the date of the death of the adoptive father. And each of the defendants contends that the true construction of these words is that the validity of his adoption shall not be challenged after 12 years from the later of the two dates assigned as the starting points of time, which in this case is the date of the adoption.

It must be confessed that the words of the Article are not such as to prevent doubt or difficulty in its construction. The expression "suit to set aside an adoption" is not quite precise as applied to any suit. An adoption may be established, but can hardly be set aside, though an alleged or pretended adoption may be declared to be no adoption at all.

Very early in the argument their Lordships asked to be informed what is meant by setting aside an adoption. The only answer is in the language of the reports, from which it would seem that the phrase "suit to set aside an adoption" is a short and familiar way of describing a class of suits well known to practitioners and spoken of in those terms with accuracy enough for all ordinary purposes. In the earliest case cited at the Bar from the S. D. A. Reports for 1850 (1) it was held that the plaintiffs had a cause of action when possession was taken under colour of an adoption. Mr. Justice Colvin says: "The plain remedy for the plaintiff was to sue to set aside the succession by adoption as declared and perfected. The present plaint is a mere attempt to evade the consequences of that neglect, and to bring the adoption to an issue under colour of a statement" of continued possession of the adopting widow. In the case cited from the S. D. A. Reports for 1856 (2) the suit was for possession of the property; but the reporter styles it "suit to set aside adoption." In the case cited from the 4th Bengal Law Reports (3), the reporter calls the suit one to recover possession and

(1) *Bhyrub Chunder Chowdhree* v. *Kulee Kishwar Raee*, S. D. A., 1850, 369.

(2) *Govind Kishore Roy* v. *Radhamadob Adheekaree*, S. D. A., 1856, 450.

(3) *Srinath Gangopadhya* v. *Mohcschandra Roy*, 4 B. L. R., F. B., 3.

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to set aside the adoption. Mr. Justice Kemp calls it a suit to set aside an adoption. Chief Justice Peacock corrects the expression, saying: "Although the suit is said to be a suit to recover possession by setting aside the illegal adoption, the suit is, in fact, a suit by the reversionary heir to recover possession notwithstanding that adoption." In the case cited from 15th Bengal Law Reports (1), where the adopting widow was still living, the suit is called one to set aside an adoption. In his judgment Mr. Justice Jackson refers to the case in the 4th Bengal Law Reports as one in which a Full Bench determined "that the cause of action in a suit for setting aside the adoption accrues after the death of the widow."

It thus appears that the expression "set aside an adoption" is and has been for many years applied in the ordinary language of Indian lawyers to proceedings which bring the validity of an alleged adoption under question, and applied quite indiscriminately to suits for possession of land and to suits of a declaratory nature. It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Art. 128 of Act XV of 1877, which corresponds to Art. 129 of 1871, so far as regards setting aside adoptions, speaks of a suit "to obtain a declaration that an alleged adoption is invalid or never in fact took place," and assigns a different starting point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression "suit to set aside an adoption" to be one of a loose kind, and that more precision was desirable.

If then the expression is not such as to denote solely, or even to denote accurately, a suit confined to a declaration that an alleged adoption is invalid in law or never took place in fact, is there anything in the scope or structure of the Act to prevent us from giving to it the ordinary sense in which it is used, though it may be loosely, by professional men? The plaintiffs' Counsel

(1) *Mrinmoyee Dabea* v. *Bhoobunmoyee Dabea*, 15 B. L. R., 1.

were asked, but were not able, to suggest any principle on which suits involving the issue of adoption or no adoption must, if of a merely declaratory nature, be brought within 12 years from the adoption, while yet the very same issue is left open for 12 years after the death of the adopting widow, it may be 50 years more, if only it is mixed up with a suit for the possession of the same property. It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions as those involved in adoptions shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by virtue of which the defendant is in possession.

Considerable stress has been laid upon a passage in the judgment which this Board delivered in the case of *Raj Bahadur Singh* v. *Achumbit Lal* (1) and which is said to be decisive of the present point. The passage is as follows :—

"Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit."

Detached from its context and from the facts of the case, that would seem to be a strong authority in favour of the plaintiffs in the present case. But when read with what goes before, it has no such effect. The suit in question was brought by the heir of Doorga Pershad to recover possession of his estate after his widow's death. The real contest was whether he had given an absolute interest to his widow-which she could transmit to the defendant. But she had executed an instrument called a deed of adoption, which their Lordships describe thus: "This document cannot be seriously treated as an attempt on the part of the widow to adopt a son or sons as heirs to her husband, but of merely an adoption of heirs to herself, and in fact a disposition of her property, very much in the nature of a will, to them after her

(1) L. R., 6 I. A., 110.

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death. . . . On the above view of the document the words of the Statute would seem scarcely applicable to it." And then follows the passage above quoted. It is clear, therefore, that in that case the plaintiff was not embarrassed by the widow's adoption of the defendant. He could recover the estate of Doorga Pershad without in any way disturbing the adoption. And to apply the remarks there made, in somewhat general terms, to a case in which the heir cannot possibly get at the ancestor's property without disturbance of a title and of possession founded on adoption to that ancestor, is to put upon them a meaning they were never intended to bear.

The result is that for the foregoing reasons their Lordships agree with the opinion expressed by the Subordinate Judge on this point. They think that the High Court should have dismissed with costs the appeal from that Judge's decree, and they will now humbly advise Her Majesty to make a decree to that effect.

The respondents, who are in the interest of the original plaintiffs, must pay the costs of these appeals.

Appeals allowed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

C. B.

CIVIL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Grant.

1886. *July* 16.

OO NOUNG AND ANOTHER (PLAINTIFFS) *v.* MOUNG HTOON OO AND OTHERS (DEFENDANTS).*

Equitable Mortgage—Deposit of title deeds—Contract of Mortgage—Letter stating terms of Equitable Mortgage, Effect of—Equitable Mortgagee, his proper remedy.

A and *B* executed a joint and several promissory note in favour of the plaintiff. On the same day *A* deposited with the plaintiff the title deeds of his property as collateral security, and received conjointly with *B* a part of the consideration money for the promissory note. Shortly afterwards *A*

* Civil Reference No. 8 of 1886, made by C. E. Fox, Esq., Officiating Additional Recorder of Rangoon, dated the 11th of May 1886.

addressed a letter to the plaintiff to this effect: "As collateral security for the due payment of Rs. 2,000 secured by a promissory note of even date * * I herewith hand you the title deeds of my property * * money borrowed and received in pledge of house," and obtained the balance.

In a suit on the basis of the documents for foreclosure, or for sale of the property, or in the alternative for a conveyance of the legal estate:

Held, that the letter itself was not a contract of mortgage, and was without registration admissible in evidence of the equitable mortgage which had been completed upon deposit of title deeds.

Held, also, that the fact of the letter would not prevent the plaintiff from giving any other evidence in proof of his claim. *Kedar Nath Dutt* v. *Sham Lall Khettry* (1) followed.

Held, further, that the plaintiff was not entitled upon the transaction to a conveyance of the legal estate, his proper remedy being by sale of the mortgaged property.

REFERENCE under s. 54 of the Burma Court's Act, 1875.

This was a mortgage suit. On the 9th September 1884 Moung Htoon Oo and another executed a joint and several promissory note in favour of Oo Noung and Mah Bwin, the plaintiffs, for the sum of Rs. 2,000. On the same day Moung Htoon Oo deposited with Oo Noung the title deeds of a piece of land in Rangoon known as 5th class, Lot No. 134, Block Y1, and shortly afterwards wrote the following letter to the plaintiffs:—

"As collateral security for the due payment of Rs. 2,000 and interest, secured by a promissory note of even date, executed by me in your favour, I herewith hand you the title deeds of my property in Lammadaw quarter, built on 5th class, Lot No. 134, in Block Y1, with all the buildings thereon, which you are authorized to hold against all persons until the said sum of Rs. 2,000 and interest are fully paid and satisfied."

At the foot of the above there was this note: "Money borrowed or received on the 5th decreased moon of the month of Tawthalin 1246 in pledge of house situated in Lammadaw quarter, rupees two thousand, and the title deeds of the house are deposited with Oo Noung and Mah Bwin." Then there was the signature of Moung Htoon Oo. The letter was an unregistered document. The consideration money, Rs. 2,000, was paid in two instalments. The sum of Rs. 1,000 was paid to Moung Htoon Oo and his co-executant of the promissory note immediately on the deposit of the title deeds,

(1) 11 B. L. R., 405.

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and about two hours afterwards, the balance, Rs. 1,000, was paid to Moung Htoon Oo upon his having signed the above letter.

Oo Noung and Mah Bwin brought a suit in the Court of the Recorder of Rangoon for foreclosure or for sale of the property, or in the alternative for a conveyance of the legal estate covered by the title deeds.

For the defence it was contended that the plaintiffs acquired no rights in the property in consequence of the letter of deposit not having been registered, and that by reason of s. 91 of the Evidence Act no other evidence but the letter could be given to prove the equitable mortgage. The following cases were relied upon:—*Dwarka Nath Mitter* v. *Sarat Kumari Dasi* (1); *Valaji Isaji* v. *Thomas* (2); *Ganpat Pandurang* v. *Adarji Dada Bhai* (3); *The Bengal Banking Corporation* v. *Mackertich* (4); *Ex parte Leathes* (5); *Ex parte Heathcoate* (6); *Daw* v. *Terrell* (7); *In re Wight's Mortgage Trust* (8); *Credland* v. *Potter* (9); *Copland* v. *Davies* (10); *The Agra Bank* v. *Barry* (11).

On the other hand, it was urged on behalf of the plaintiffs (*a*), that the letter did not require registration; (*b*), that even if it did other evidence than the letter could be given to prove the mortgage; and (*c*), that in any case it was admissible in evidence for the purpose of substantiating their claim to a conveyance of the legal estate:—*Kedar Nath Dutt* v. *Sham Lall Khettry* (12); *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (13); *The Bengal Banking Corporation* v. *Mackertich* (4). The Additional Recorder who tried the case was of opinion (*a*) that on the authority of *Kedar Nath Dutt* v. *Sham Lal Khettry* (12) the letter of deposit was admissible in evidence in proof of the equitable mortgage; (*b*), that upon the facts as found by him, the letter or memorandum of deposit was not admissible in evidence in proof of the right which the plaintiffs claimed to a conveyance of the

(1) 7 B. L. R., 55.
(2) I. L. R., 1 Bom., 190.
(3) I. L. R., 3 Bom., 312.
(4) I. L. R., 10 Calc., 315.
(5) 3 D. and C., 112.
(6) 2 M. D. and De Gex., 711.
(7) 33 Beav., 218.
(8) L. R., 16 Eq., 41.
(9) L. R., 10 Ch. App., 8.
(10) L. R., 5 H. L., 358.
(11) L. R., 7 H. L., 135.
(12) 11 B. L. R., 405
(13) I. L. R., 5 Bom., 143.

legal estate; and (*c*), that the letter or memorandum of deposit was "only a writing" which was evidence of the fact from which the contract was to be inferred, and that any other evidence might be given of the same fact.

But entertaining doubts on the points, the Additional Recorder referred the following questions to the High Court:—

(1) Whether the unregistered letter or memorandum of deposit is admissible in evidence in proof of the equitable mortgage claimed.

(2) In the event of the first question being answered in the negative, whether the letter of deposit is admissible in evidence in proof of the right which the plaintiffs claim to a conveyance of the legal estate.

(3) Whether, in consequence of the letter of deposit, the plaintiffs are precluded from giving any other evidence in proof of their claims mentioned in the second question.

Mr. *Sale* (instructed by Messrs. *Harris & Simmons*) for the plaintiffs.

No one appeared for the defendants.

The opinion of the High Court (MITTER and GRANT, JJ.) was as follows:—

We think that the present case is entirely governed by the judgment in *Kedar Nath Dutt* v. *Sham Lal Khettry* (1). As in that case, so in this, the question is, whether the memorandum or the letter of deposit referred to in the questions submitted to us was itself a contract of mortgage, or simply evidence of a fact from which the mortgage could be inferred. We think for the reasons given in *Kedar Nath Dutt's case* that the letter of deposit, as it is called in the questions submitted to us, was not a contract of mortgage between the parties. The equitable mortgage was effected by the deposit of the title deeds by the defendant No. 1 before the writing of that letter of deposit took place. In that letter it is simply recited that an equitable mortgage had been effected by the deposit of title deeds.

Not only is the present case supported by the judgment of the Appellate Court, in the case of *Kedar Nath Dutt*, but it may also be supported by the reasons given in the judgment of Mr.

(1) 11 B. L. R., 405.

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Justice Macpherson, who heard the case of *Kedar Nath Dutt* in the Original Court. There the transaction, according to the view taken by the Appellate Court, was not completed till the debtor in that case executed the note of hand, but in this case the execution of the note of hand preceded the deposit of the title deeds, and the letter of deposit was written about two hours after. That being so we think that in this case the transaction was completed before the letter of deposit was written. Upon both these grounds we agree with the learned Recorder in the answers to be given to the questions submitted to us. But with reference to the second question we desire to say that we by no means endorse his view that the plaintiffs would be entitled to a conveyance to them of the legal estate. This question has not been referred to us, but if it were, we should be inclined to hold that the proper remedy is by sale of the mortgaged property.

The record will be returned to the lower Court, and under s. 57 of Act XVII of 1875 the costs of this reference shall be considered as costs in the suit.

K. M. C.

APPELLATE CIVIL.

1886 *July* 26.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

HIRA LAL CHATTERJI (PLAINTIFF) *v.* GOURMONI DEBI (DEFENDANT).*

Civil Procedure Code, 1882, *s.* 244—*Suit to recover purchase money on reversal of decree under which Sale in Execution took place—Separate suit—Party to proceedings in execution.*

G instituted a suit against *H*, *C* and *P*, which was dismissed with costs, but an appeal was preferred. Pending the appeal, however, *C* took out execution of the decree for costs, and brought to sale a house belonging to *G* of which *H* became the purchaser, paid the purchase money, and got possession. Subsequently the decision dismissing the suit was reversed on appeal, and the defendants in that suit were ordered to pay a certain sum to *G* with costs. *G* then applied for restitution of her house which had been sold under the decree reversed, and eventually obtained an unconditional order for possession, *H* being left to any remedy open to

* Appeal from Original Decree No. 530 of 1885, against the decree of Baboo Sharoda Prosad Chatterji, Rai Bahadur, Subordinate Judge of Hooghly, dated the 8th of September 1885.

him in respect of the purchase money. *G* having obtained possession of the house, *H* brought a suit against her to recover the purchase money: *Held*, that notwithstanding s. 244 of the Civil Procedure Code, he was entitled in this suit to recover the purchase money, as money received to his use, the consideration for it having failed. *H* was not, in his character as an auction purchaser, a party to the execution proceedings, and for the purpose of the suit was to be treated as a third person.

THE facts of this case were that the defendant Gourmoni had, on the death of her daughter-in-law, succeeded to the estate of her son Jodu Nath Chatterji, and instituted a suit against Hira Lal Chatterji the present plaintiff, and two other persons, Charu and Petambur, to recover two Government promissory notes belonging to that estate, which she alleged were being withheld from her by fraud. That suit was, in the first Court, dismissed with costs, but on appeal that decision was reversed, and the three defendants were directed to pay her the sum of Rs. 2,500 with costs. Before the decision in appeal, however, the defendant Charu took out execution of the decree of the first Court for costs, and brought to sale a house belonging to Gourmoni, of which the present plaintiff Hira Lal became the purchaser. After the reversal of the first Court's decision on appeal, Gourmoni applied for restitution of her property which had been sold under the decree reversed, and eventually obtained an unconditional order for possession of the house, Hira Lal being left to any remedy open to him in respect of the purchase money. Gourmoni having obtained possession of the house, Hira Lal brought this suit against her to recover the purchase money with interest, and the costs of certain improvements made while it was in his possession.

The main defence was that the plaintiff had no cause of action, and that the suit was not maintainable with respect to s. 244 of the Civil Procedure Code, the purchase money being only recoverable in the execution proceedings.

The lower Court found that the suit was not unsustainable on that ground, but that equitably the plaintiff was not entitled to recover the purchase money; he therefore dismissed the suit.

The plaintiff appealed to the High Court.

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HIRA LAL CHATTERJI v. GOURMONI DEBI.

Baboo *Nil Madhab Bose* for the appellant.

Dr. *Guru Das Banerjee*, and Baboo *Boidyo Nath Dutt*, for the respondent.

The following judgments were delivered by the Court (PETHERAM, C.J. and GHOSE, J.)

PETHERAM, C.J.—This is a suit which has been brought by the plaintiff against the defendant to recover a sum of Rs. 2,750 and interest, and various other sums. The lower Court has dismissed the suit altogether, and so the matter comes before us now in appeal.

The facts of the case are that, some time ago, the present defendant brought a suit against the present plaintiff, and two other persons, to recover a certain sum of money. It is immaterial to enquire what that suit was about. The Court of first instance dismissed that suit with costs, which amounted to Rs. 300 and odd. The plaintiff in that suit appealed from that decision, and while the appeal was pending the defendants in that suit sued out execution of their decree for costs, and in the execution proceedings the house, in which the then plaintiff was living, was sold and purchased by the present plaintiff, one of the defendants in that suit, for Rs. 2,750. Out of that amount the costs, on account of which the execution had been taken out, were satisfied, and the balance, amounting to Rs. 2,429, was paid into Court, whereupon the plaintiff (the present defendant) applied to have that amount paid out to her, and that was accordingly done.

The state of things, therefore, was this; that the house had passed into the hands of the auction-purchaser, who happened to be also the execution-creditor, the costs for which execution had been issued was satisfied, and the balance of the purchase money, the Rs. 2,429, had passed into the hands of the plaintiff in that suit, that is, of the person whose house it was that had been sold.

That being the state of things, the next thing that happened was, that the appeal, which had been preferred by the then plaintiff, came on for hearing. The Appellate Court was of opinion that the decree under which the house had been sold

was wrong, and that there ought to have been a decree in favor of the then plaintiff. The Judge, therefore, set aside that decree and decreed the plaintiff's suit, and consequently that decree being gone, the sale was gone too, and had to be got rid of in some form or other.

It being borne in mind that the person who had purchased the house in execution was one of the defendants, and consequently a party to the cause, an application was made by the now defendant, who was the plaintiff in that suit, under the provisions of the Code of Civil Procedure, for restitution of her property. This application appears to have been resisted by the auction-purchaser, to this extent, that he stated that, if the house were restored to the plaintiff, the purchase money should be refunded to him. It is true that this does not appear directly, but the owner of the house having, in that proceeding, objected to return the money, it may be inferred that the person who had paid the money had made some such objection as that.

However that may be, the Judge before whom the matter came, seems to have held that, as between the parties to the suit he was entitled to order the restitution of the house because the decree had been set aside, but that he was not in a position to say that, if that were so, the money should be paid back as well. But whether he came to that conclusion or not, at all events he refused to make the order that the money should be returned to the purchaser, although he ordered that the house should be re-conveyed to the plaintiff in that suit by her.

The state of things, therefore, now is, that the house having been re-conveyed by the purchaser to the then plaintiff, she remains in the position of having both the house and the money, which was paid as the consideration for it, and of which she applied to have her share paid out of Court to her, and which was so paid; and the question arises, whether, under such circumstances, the person who paid the money for the purchase of the house can recover it from her, the owner of the house, as money received to his use, the consideration for it having failed.

I am of opinion that he can. I think that the money was money which was paid by him into Court, in consideration that this particular house should be conveyed to him; and I think that

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when the owner of the house applied to the Court and took the money out, she in a manner confirmed the sale; as between herself and the purchaser she made the transaction her own; and, therefore, I think, that when she put the law in motion to cancel the sale and take the house back again, she placed herself in the position of a person having in her possession money which belonged to another, the consideration for which had failed and so came within the ordinary rule of law that a person under these circumstances can be made to refund the money to the person fairly entitled to it.

I think, therefore, that notwithstanding the provisions of the Code of Civil Procedure, which provide that all matters between parties to the execution proceedings shall be decided in the execution department, we are entitled to do justice and say that this money must be returned to the plaintiff, and a sufficient reason to give for that is that the plaintiff, in the character in which he appears in this suit, was not a party to the execution proceedings. His character, with reference to this transaction, was that he was an auction-purchaser. It is a mere accident that he was an auction-purchaser in a suit in which he was one of the parties. In this suit he must be treated as a third person. He is, therefore, I think, entitled to maintain this suit without reference to the provisions of s. 583 taken along with s. 244 of the Code of Civil Procedure.

Under these circumstances I am of opinion that the decree of the Court below must be varied by giving the plaintiff a decree for the sum of Rs. 2,429, with interest thereon at the rate of six per cent. per annum from the 15th March 1885 to this date. The costs will be in proportion to the amounts decreed and disallowed respectively.

GHOSE, J.—I agree to the decree which my lord proposes to pass in this case.

J. V. W. *Decree varied.*

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

LALIT MOHUN SHAHA (PLAINTIFF) *v.* SRINIBAS SEN (DEFENDANT.)*

1886 *July* 29.

Arrears of rent, Suit for—Payment by Durputnidar to stay sale—Regulation VIII of 1819—*Bengal Act VIII of* 1869, *s.* 62.

The zemindar of an estate, in which the plaintiff and defendant respectively had purchased putni and durputni tenures, obtained decrees for arrears of rent accruing before their purchases, though one of the decrees was obtained subsequently to defendant's purchase, and in execution of these decrees he advertized the putni for sale, and the amounts due were paid into Court by the defendant to protect the tenure from sale. In a suit by the putnidar against the durputnidar for arrears of rent accruing due subsequently to the defendant's purchase: *Held* that the defendant was on the construction of s. 13 of Regulation VIII of 1819, and s. 62, Bengal Act VIII of 1869, entitled to set off such payments against the plaintiff's claim. *Nobogopal Sircar* v. *Sreenath Bandopadhya* (1), followed.

THIS was a suit for arrears of rent in which the defendant claimed to set off against the plaintiff's demand sums paid by him, as he alleged, on behalf of or for the benefit of the plaintiff, to save the estate from sale. The plaintiff and defendant had become by purchase respectively putnidar and durputnidar under the same zemindar. The amounts the defendant claimed to set off were payments into Court made by him in satisfaction of decrees obtained by the zemindar against the putnidar, under whom the defendant's durputni was held, one of these decrees being previous, and the other subsequent, to the date of the defendant's purchase, which was admittedly made at an auction sale of the tenure for its own arrears.

The Munsiff found that the defendant was not entitled to set off the amount paid in respect of the decree obtained before the defendant's purchase, but he allowed the set off in respect of the other decree. He therefore decreed the plaintiff's claim in part only.

On appeal, however, the Judge allowed the whole set-off claimed by the defendant.

From this decision the plaintiff appealed to the High Court.

* Appeal from Appellate Decree No. 898 of 1886, against the decree of H. F. Matthews, Esq., Judge of Nuddea, dated the 2nd of February 1886, modifying the decree of Baboo Girindra Mohun Chuckerbutti, Munsiff of Kooshtea, dated the 12th of September 1885.

(1) I. L. R., 8 Calc., 877.

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LALIT MOHUN SHAHA v. SRINIBAS SEN.

Baboo *Nil Madhab Bose* and Dr. *Gurudas Banerjee* for the appellant.

Baboo *Durga Dass Dutt* for the respondent.

The judgment of the Court (PETHERAM, C.J., and GHOSE, J.) was as follows :—

PETHERAM, C.J.—The plaintiff in this suit is a person who, in the month of Srabun 1289 (July 1882), purchased a putni by private sale. At the time of his purchase, the land, which was the subject of the putni, was in the possession of the defendant as durputnidar, he having bought it at an auction sale for arrears of rent due upon the tenure, some six months previously, and at the time of these purchases there was due to the zemindar, or the superior landlord of the whole, three years' rent at the rate of Rs. 43 a year, that rent having become due before either the plaintiff or the defendant had got on to the land.

By the terms of the durputni under which the former durputnidar, whose tenure has now passed to the defendant, held the property, he was to pay to the putnidar, who, since the purchase, is represented by the plaintiff, the sum of Rs. 73 annually; Rs. 43 was to be paid to the zemindar in discharge of the putni rent; and the remaining Rs. 30 to his (the defendant's) immediate landlord, the putnidar, now represented by the plaintiff.

That being the state of things, the zemindar obtained a decree against the plaintiff's predecessor in title, or at all events, in the name of the plaintiff's predecessor in title (he being the person whose name appeared in his sherista), for the three years' arrears which were due from the putnidar to him, and in satisfaction of that decree he advertized the putni for sale. The plaintiff, the then putnidar, did not pay the money covered by the decree, but it was the defendant who did so, and thus saved the putni from being sold.

It must be borne in mind that the decree was for a sum of money for which the putni was liable to be sold in whosesoever hands it might be found, and upon the sale of the putni, all the subordinate interests, including that which had come into the hands of the defendant, would have fallen in, and the zemindar would have been in a position to turn out all under-tenants and take the land into his own hands.

It must also be borne in mind that the person who was *personally* liable to the zemindar for the rent, at the time when it became due, was the former putnidar. Under these circumstances, it is clear that the present plaintiff could not be personally liable for the rent, because he made no contract with the zemindar to pay it, and his interest only came into existence after the money became due.

If this were a matter to be decided without reference to legislation, I should be disposed to say that the defendant was not entitled to set these payments against the plaintiff's claim for rent, which became due subsequent to his, the defendant's, purchase of the durputni. But this is not a matter which can be decided in that way; it must be decided with reference to s. 13 of Regulation VIII of 1819 as extended by s. 62 of Bengal Act VIII of 1869 to under-tenures under this Act, and then the question arises, whether the meaning of those sections is, that the holder of a subordinate tenure of this kind, who, for the protection of the whole tenure, makes a payment to the zemindar, which the owner of the tenure above his ought to have paid, is entitled to deduct the amount so paid from the rent payable to his putnidar, in whosesoever hands the putni may be, or to treat the sum as a loan made to the person who, at the time of the payment, happens to be the owner of the putni.

This Regulation has received judicial interpretation. In the case of *Nobogopal Sircar* v. *Srinath Bandopadhya* (1) this Court held that the durputnidar is to treat the proprietor of the putni as his debtor, whether the original rent accrued in his time or not. I think that that decision, unless we are clearly of opinion that it is wrong, is binding upon us; and having regard to that fact, and also to the fact that, reading that Regulation carefully, it seems that the meaning of the Legislature was that which is put upon it by the Judges of this Court, and bearing also in mind that the tenure held by the plaintiff was primarily liable for the claim of the zemindar, I think that we must follow that case; and in that view I think that the appeal must be dismissed with costs.

J. V. W. *Appeal dismissed.*

(1) I. L. R., 8 Calc., 877.

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

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August 19.

UMER ALI (COMPLAINANT) *v.* SAFER ALI AND ANOTHER (ACCUSED.)*

Criminal Procedure Code, ss. 191, 202, 203—*Complaint—Magistrate, Power of—"May take Cognizance of", Meaning of.*

The use of the term "may take cognizance of any offence" in s. 191 of the Criminal Procedure Code does not make it optional with a Magistrate to hear a complainant, but refers rather to the action of the Magistrate in taking cognizance of an offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant and then can either issue summons to the accused or order an enquiry under s. 202, or dismiss the complaint under s. 203.

THE material portion of the reference to the High Court in this case was as follows :—

"On the 2nd June the complainant presented a complaint against Safer Ali and another, charging them with offences under ss. 323 and 352 of the Penal Code before the Joint Magistrate of Chittagong, Mr. S. J. Douglas. That Magistrate recorded an order to the following effect : "I decline to take cognizance of this frivolous matter. Complainant seems to have freely abused the man who cuffed him." Against this order an application was made by the complainant before the late Officiating Sessions Judge, Mr. R. H. Greaves, who called upon the Joint Magistrate to inform him whether complainant had been examined before his complaint was dismissed. The Joint Magistrate in his reply informed him that the complaint had not been dismissed at all, but that under s. 191 of the Criminal Procedure Code he had declined to take cognizance of the offences stated in the complaint, that section by the use of the words "may take cognizance of an offence upon receiving a complaint of facts which constitute such offence" authorizing a Magistrate to use his discretion in so taking cognizance. With this view of the law the late Officiating Sessions Judge disagreed, and a further explanation was called for

* Criminal Reference No. 154 of 1886, made by F. H. Harding, Esq., Sessions Judge of Chittagong, dated the 22nd of July 1886, against the order passed by S. J. Douglas, Esq., Joint Magistrate of Chittagong, dated the 2nd of June 1886.

from the Joint Magistrate : that explanation has since been received. The opinion of the late Officiating Sessions Judge was that the matter should be referred to the High Court, and as I am of the same opinion as he was I am adopting this course.

"It appears to me that s. 191 of the Criminal Procedure Code does not contemplate such a procedure as that which has been adopted by the Joint Magistrate. It specifies the circumstances in the existence of any one of which a Magistrate may take cognizance of an offence, and in the absence of which he is precluded from taking such cognizance. The words "take cognizance" are not defined in the Criminal Procedure Code. In the present instance the petition was received by the subordinates of the Joint Magistrate's Court, and the stamp was punched. It appears to me that, having gone so far, the Joint Magistrate was bound to record the examination of the complainant under s. 200, after which he could have dealt with the case under ss. 202 and 203 if he thought proper.

"The matter is one with which I am not able to deal under s. 437, for the complaint has not been dismissed under s. 203. That s. 191 was not intended to confer upon Magistrates the power of dealing with complaints in the manner adopted by the Joint Magistrate is, I think, apparent from the fact that, whilst s. 437 gives the Court of Session power to order an enquiry into a complaint which has been dismissed under s. 203, it gives it no such power with regard to cases of which the Magistrate has refused to take cognizance. That this is an omission is very improbable, for this asserted power of refusing to take cognizance under s. 191 is even more likely to be abused than that of dismissal given under s. 203.

"The matter is one of considerable importance, and I think it desirable on this account to have an authoritative decision on the point."

No one appeared for either party on the reference.

The opinion of the Court—(PRINSEP and GHOSE, JJ.) was as follows :—

The Joint Magistrate has taken an erroneous view of the law regarding proceedings to be taken on receipt of a complaint made under s. 191 of the Code of Criminal Procedure. He is not competent

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to refuse to take cognizance of an offence on receipt of a complaint of facts constituting an offence, but he is rather bound to examine the complainant. He can then proceed to issue summons on the accused or to order an enquiry under s. 202, or to dismiss the complaint under s. 203. The use of the term "may take cognizance of any offence" does not make it optional with a Magistrate to hear the complainant. It refers rather to the action of a Magistrate in taking cognizance of an offence in either of these specified courses in which the facts, constituting an offence, may be brought to his notice. The case must be tried.

J. V. W.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1886 *July* 29.

KEDAR NATH COONDOO CHOWDHRY (DEFENDANT No. 1) *v.* HEMANGINI DASSI (PLAINTIFF).*

Hindu law—Maintenance—Maintenance of mother on partition between her son and step-sons.

A widowed mother on a partition taking place between her son and her step-sons, of the property left by her husband, is not entitled to have the whole property charged with her maintenance, but only that portion of it which is allotted to her son on the partition.

A separation in food and worship took place between a Hindu widow, her son and her two stepsons, after which the widow lived as a member of her son's family, and was maintained by him. A partition of the moveable property having been made, a suit was brought by the son against the step-sons for partition of the immoveable property, and a decree was made defining the shares of the parties therein. That suit was brought and decreed pending a suit by the widow against her son and stepsons for maintenance from the date of the separation, and for fixing her future maintenance, in which suit she sought to have the maintenance charged on the whole estate left by her husband. *Held* that, from the separation to the decree in the partition suit, the widow was entitled to maintenance charged on the whole estate; and subsequently to the decree to a charge on her son's share only. But inasmuch as she had during the former period, been maintained by her son, and could not claim maintenance over again from her stepsons, whatever

* Appeals from Original Decrees No. 396 and 414 of 1885, against the decree of Baboo Bhuban Chunder Mookerji, Rai Bahadoor, Subordinate Judge of Hooghly, dated the 30th of March 1885.

claim her son might have against them for contribution for her maintenance during that time, the suit as against them must be dismissed.

Where the annual value of the whole estate was found to be Rs. 70,000, and the proportionate annual value of her son's portion was Rs. 23,333, Rs. 150 a month was held under the circumstances to be a suitable maintenance.

THE facts of this case are sufficiently stated in the judgment of the Court (PETHERAM, C.J., and GHOSE, J.)

Mr. *Woodroffe* and Baboo *Troilokya Nath Mitter* for the appellant.

Mr. *Evans*, Baboo *Guru Das Banerjee*, and Baboo *Karuna Sindhu Mukherji*, for the respondent.

These two appeals arise out of a suit brought by Sreemutty Hemangini Dassi, widow of the late Tara Churn Coondoo, for maintenance. The said Tara Churn Coondoo had two wives—Prosunnomoyi and Hemangini; the plaintiff. Prosunnomoyi predeceased Tara Churn, and the latter died on the 8th Bysack 1272 (19th April 1865) having executed a will on the 5th Bysack 1272, and leaving Hurrish Chunder Coondoo, the defendant No. 2, his son by Hemangini, and two other sons, Kedar Nath, the defendant No. 1, and Annoda Pershad. The latter died in June 1882, leaving a will by which Kedar Nath, his whole brother, was appointed executor of his estate. So that Kedar Nath is the defendant in this suit, not only on his own behalf, but also as representing the estate left by Annoda Pershad.

The present suit as already mentioned is by Hemangini Dassi, the mother of Hurrish Chunder, the defendant No. 2, for maintenance, and it is a suit not only against her own son but also against her stepson Kedar Nath, and the legal representative of Annoda Pershad, the other stepson. It seeks to establish a charge for her maintenance against the whole estate left by her husband Tara Churn Coondoo. The plaint states that, on the 12th Falgoon 1290 (23rd February 1884) the family became separate, and since then the plaintiff has been obliged to provide herself with the expenses of her maintenance and the performance of religious ceremonies; that she served the defendants with a notice in respect to her claim for maintenance, and that the defendants not having complied with the requisition contained in the said notice, she has

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been compelled to bring the suit. And she prays that a sum of Rs. 500 per month be determined to be the proper allowance for her maintenance, and the expenses for religious ceremonies and pilgrimages, and that it be declared to be a charge upon the estate left by her husband. She also prays that Rs. 3,000, being the amount of her maintenance at the above rate since the date of the separation until the date of the institution of the suit, may also be decreed.

It appears that since the institution of this suit, which was on the 13th September 1884, and the filing of the written statement by Kedar Nath on the 6th December 1884, the plaintiff's son Hurrish Chunder instituted two suits for partition of the family estate; one was against Kedar Nath and the legal representative of Annoda Pershad, as also against Gooroo Dass Coondoo and others who are the cousins of Kedar Nath and Hurrish Chunder, and who represent a collateral branch of the family, in respect of the properties which then belonged jointly to both the branches of the family, and of which a six annas share belongs to Tara Churn's branch of the family; and the other suit was against Kedar Nath and the representative of Annoda Pershad, in respect to such properties as belonged exclusively to Tara Churn and his descendants; and it appears that one of the main grounds upon which the present suit was defended by Kedar Nath Coondoo was that, there having been already a separation in food and worship, as admitted by the plaintiff, and also by reason of the said partition suits then pending in Court, the plaintiff was not entitled to any decree for maintenance against him, but that her claim could only lie against her own son, and that the same could only be realized out of the share of the joint property which was to be allotted to her son upon the partition. The defendant also pleaded that, upon the terms of the will left by Tara Churn Coondoo, the suit could not be maintained, and that the plaintiff since the separation had been living in joint mess with her son, and all her expenses were being supplied by him; and that lastly the amount of maintenance claimed by her was too exorbitant. Hurrish Chunder Coondoo, the plaintiff's son, made no defence in the suit; and it would appear upon the conduct of the parties that it is a suit not really against her stepson

as also her own son, but her stepsons alone, and that had it not been for the suit for partition by her son which was then evidently contemplated, the present suit would not most likely have been instituted.

The Subordinate Judge has substantially found that the plaintiff's allegation that she was obliged to provide herself for her own maintenance since the separation is untrue, and that, as a matter of fact, she has been residing with her own son, who is prosecuting the case. He has accordingly disallowed her suit so far as back maintenance was concerned. He is, however, of opinion that the plaintiff's maintenance being a charge upon the whole estate left by Tara Churn, and the estate having not been actually partitioned, she is entitled to a declaration of her right to maintenance as against the entire estate; and being also of opinion that the terms of the will executed by Tara Churn do not preclude the plaintiff from maintaining this suit, and that Rs. 180 per month is a suitable allowance for her separate maintenance, ordinary *brotus*, extraordinary *brotus*, piousacts and pilgrimages, he has given a decree to the plaintiff declaring that the said amount is to be a charge upon the estate left by her husband now in the hands of the defendant No. 1 and the defendant No. 2, in the proportion of two-thirds and one-third share, that is to say, the defendant No. 1, Kedar Nath Coondoo, to pay Rs. 120 per month, and her own son, defendant No. 2, Rs. 60 per month.

It would appear from the evidence on oath given by Kedar Nath Coondoo in the cause that, at the time when the decree was passed by the Subordinate Judge, there had already been a division between the plaintiff's son and her stepson of the cash and Government securities, and it would further appear from the two judgments in the said partition suits and copy of the plaints in the said suits that were produced before us at the hearing, and which were received in evidence by the consent of both parties, that a decree has been passed on the 20th February of the present year determining in the suit of Hurrish Chunder against both the branches of the main family, the share of Hurrish Chunder to be 2 annas and of Kedar Nath and his nephews to be 4 annas out of the 6 annas share in properties belonging jointly to the whole

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family. The share of Hurrish Chunder in the separate properties of Tara Churn Coondoo's branch of the family has also been determined, we take it, upon the same principle, the judgment in the other suit having been referred to in the judgment which related to the exclusive properties of Tara Churn and his defendants, that is to say the share of Hurrish Chunder being one-third and that of Kedar Nath and his nephews being two-thirds. It would further appear from the above two judgments that the shares of the parties being defined, accounts have been ordered to be taken by the Commissioners, and partition made between the parties.

In this state of things the question that arises for consideration is, that in view of the said decree for partition, what is the relief which the plaintiff is entitled to in regard to her maintenance ?

This question, we may say, seems to be one almost of the first impression, there being no distinct text in the Hindu law-books nor any distinct authority upon the matter.

There can be no doubt that, under the Hindu law, the maintenance of a widow is a charge upon the inheritance, that is to say, upon the whole estate which, upon the death of the last owner, devolves upon his legal heirs, and in that view, so long as the estate left by Tara Churn Coondoo remained joint and undivided, there can also be no doubt that the plaintiff would be entitled to claim her maintenance out of the whole estate held by the defendants. But then the question is, what would be the rights of the plaintiff, and the true position of the parties, if there be a partition as between the plaintiff's son on one hand and her stepsons on the other hand ? No doubt, as matters at present stand, there has not been a complete partition between the parties, but it is clear at the same time that their shares have been ascertained and defined, and as a matter of fact there has been a partial division of the properties, which have the effect in law of making the plaintiff's son Hurrish Chunder a separate member of the family and entitled to a separate and defined share of the family property.

It was contended by the learned counsel for the plaintiff that the rights and liabilities of the parties were to be determined

and regulated by facts as they existed at the time when the suit was brought, and not as they occurred subsequent thereto ; and that the question raised by the defendant in this case should be left to be determined in the partition suit in which the mother was one of the defendants. But we cannot accept this view of the matter. We think we cannot shut our eyes to the fact which appears upon the record, and upon the two judgments adverted to above, *viz.*, that there has been a definition of the shares of the plaintiff's son and of the defendants, and also a partial partition in accordance with such shares ; and it therefore seems to us that we are called upon in this suit to make such a decree as would be consistent with the true state of the family as it exists at present. The parties to the suit are governed by the Bengal school of law, and we have to determine what, under the law as it is administered in Bengal, the true rights of the plaintiff are in respect to the maintenance claimed by her.

The rights of a Hindu widow as a widow arise out of the marriage, and upon the death of her husband, in the event of there being no sons, she succeeds, under particular texts, to the estate left by her husband. Where the husband leaves a son or sons, all that she is entitled to is maintenance out of the estate. When during the lifetime of her husband there is a partition of the family property, she gets if she is sonless, but not if she has a son, (in which case her son alone is entitled to a share) an equal share with the sons of her husband ; but where there is no such partition during the lifetime of her husband, what she is entitled to get, when the estate, upon her husband's death, passes to the sons, whether she has a son or sons born of her, or not, is only maintenance out of the estate. And when the Hindu law prescribes a share being allotted to a woman after her husband's death, upon a partition amongst her sons, it is a share which is given to her simply in lieu of maintenance, and not because she is a coparcenor in the estate, or that she has any pre-existing rights, and the share which is thus given to her reverts upon her death to those heirs of her husband out of whose portion the said share was taken (see Shama Churn's Vyvasta Darpana, Edition 1883, pp. 488, 521-522, and the authorities quoted

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therein; Strange's Hindu Law, Edition 1830, Vol II, p. 307, and *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (1).

The question that then arises is, what may be her rights upon a partition taking place between the sons? In the case of many sons of one individual by different mothers, where the number of sons is equal, the partition, according to certain texts, may be made by them by allotment of shares to the mother, that is to say, there being no difference in the son's shares, each of the mothers takes a share for her sons. If, however, the sons are unequal in number, then a division, with reference to their mothers, cannot be made, and in that event the partition is made with reference to the number of sons themselves (see Dyabhaga, Ch. III, Sec. I, V. 12 and 13; Vyvasta Darpana, pp. 461-463, and the texts quoted therein.) When the partition is made between the different groups of sons born of different mothers, their mothers, whether they be their own mothers or step-mothers, get no share whatsoever, and this is apparently upon the principle that they are not the natural mothers of all the sons (see Vyvasta Darpana, 518, and the authorities cited therein, and Col. Dig., Vol. 3, pp. 98-102). When subsequently, each group of sons come to a partition among themselves it is then that their respective mothers get a share, but a mother having no son, or only one son, gets no share at all, but simply maintenance. If, however, at the time of partition with half brothers, the uterine brothers also come to a partition amongst themselves, their mother would be entitled to a share out of her own son's shares (see Vyvasta Darpana, pp. 518 and 519; Dyabhaga, Ch. III, Sec. 2, V. 29 and 30; *Joymonee Dassee* v. *Attaram Ghose* and *Seebchunder Bose* v. *Gooroopersaud Bose* (2). In the case of the number of sons by different mothers being equal, the partition, as already observed, may take place with reference to the mothers, the principle evidently being that each of the mothers and her sons become by the separation and partition the members of a distinct and separate family, holding as it were in common the share which is allotted to them; likewise in the case of a partition, where the number of sons is unequal, and where

(1) 9 W. R., 62.

(2) Macnaghten's Cons. of H. L, pp. 64-72.

the separation is between the several groups of sons, each of the groups becomes one joint family, and their mothers become members of their respective families, and continue to be so until there is a separation and partition among her sons. This seems to be almost the universal practice in Bengal, and no instance, as far as we are aware, has occurred where, notwithstanding such a separation and partition, a mother has claimed her maintenance against her stepsons. Having become a member of her own son's family, she would naturally look to her sons, and not to her stepsons, for her maintenance, and indeed that was the view that was thrown out by Sir Francis Macnaghten so early as the year 1824 (see pp. 42 and 59 of his book; as also Strange's Hindu Law, Vol. II, pp. 291 and 309); and this seems to be but consistent with the Hindu Law; for, in the event of a partition taking place amongst her own sons, she gets a share out of her sons' shares, and not out of her stepsons' shares. In this view of the matter the mother can only claim maintenance in her sons' family, whether she has only one son or more sons than one; the only difference being that in the latter case, upon a partition amongst the sons, she gets a share in lieu of her maintenance, whereas in the former case, there being no partition possible, she cannot possibly get a share but must be content with a maintenance. In the case of *Joymonee Dassee* already referred to, it will be found upon an examination thereof, that upon a partition between Laskhi Priya's son Atmaram, and his three half brothers, it was understood and admitted, and it was accordingly declared that his mother Lakshi Priya was not entitled to any separate property but was to look to her son for her maintenance. It is indeed true that Lakshi Priya, the mother, was at the time of the suit not subject to the jurisdiction of the Supreme Court which dealt with the case, and as such the above declaration was not binding upon her, but we do not refer to the said declaration as a precedent in this case, but simply as showing what so late back as in December 1823 was fully understood to be the true position of a mother situate as the present plaintiff is.

So long as there is no partition between the several groups of sons, a mother has indeed the security of the whole estate left by her husband for her maintenance, and this is just and proper,

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because, so long as the estate remains joint, she is not in a position to predicate which particular share of the family property is to be charged for her maintenance; but the moment such a partition takes place, she is in a position to predicate it, because the share which is eventually to come to her in lieu of maintenance, when such a share does come to her by the act of her own sons, is to come out of her sons' share of the family property; so that it is but consistent with reason, equity and justice that, upon the partition taking place, her maintenance is to attach to that share of the estate which is allotted to her sons. By the separation and partition she becomes a member of her sons' family, and it would not seem to be reasonable that she should be allowed to claim maintenance against another family of which her stepsons become members; and, indeed, if she could claim such a right, the partition itself would be but an imperfect one.

It was argued before us that the same principle which governs the rights of a sonless widow, ought to govern the case of a widow who may have a son or sons, that is to say, whereas a sonless widow gets no share but only maintenance which is to come out of the whole estate, so in the case of a mother having a son or sons, a decree should be made charging the whole estate, or charging any particular portion of the estate which may be adequate for her maintenance. But it appears to us that the case of a sonless step-mother is very different indeed from the case of a mother having son or sons, because upon a separation and partition taking place, the step-mother does not become the member of any particular family, but she continues, as it were, a member of all the families into which the original family is divided; and she is therefore not in a position to predicate which particular share of the family property ought to provide for her maintenance. In the present case, it seems clear that the plaintiff upon a separation and partition between her son and stepsons does become, and has in fact become, as substantially found by the Sub-Judge, a member of her son's family; and she is in a position to predicate which of the shares of the family property determined by the partition ought to provide for her support.

Upon all these considerations it seems to us that up to the time of the decree for partition defining the separate shares of the members

of the family, the plaintiff would be entitled to claim her maintenance against the whole estate, and subsequent thereto against the share allotted to her son. But then it appears that since the separation in 1290 she has been maintained in the family of her son, and as such cannot justly claim maintenance over again from her stepsons, or the share which now belongs to them. Possibly, her son could claim contribution from her stepsons for the money spent by him for her maintenance, but that is not the matter now before us. The result, therefore, is that so far as her stepsons are concerned, this suit must fail.

The plaintiff's son has preferred no appeal against the decree passed by the lower Court, and inasmuch as her maintenance is to come out of the share which has devolved upon him, and also because it is optional with her either to remain in joint mess with her son or not, it becomes necessary to determine what may be a suitable allowance for her. Mr. Strange, in his book on Hindu law, see Vol. I, p. 171, observes as follows: "It," meaning maintenance, "may be supplied by assignment of land or an allowance of money, in either case proportioned to her support, and that of those dependent upon her, including the performance of charities, and the discharge of religious obligations; and this always with reference to the amount of the property so as at the utmost (as has been said) not to exceed a son's or other parcener's share. In whatever way the provision is made, care should be taken to have it secured. The manner of doing this is discretionary, there being no special law directing how provision is to be made." See also Shama Churn's Vyvasta Darpana, p. 152, and cases quoted in Vol. II, pp. 359-361 and 368. In view of the principles enunciated above, and bearing also in mind that the performances of religious ceremonies, acts of piety, and pilgrimages, are for the benefit of the soul of her departed husband, and also for her own spiritual benefit, we think that without following the details which have been adopted by the Subordinate Judge, and without expressing any opinion as to the necessity or otherwise of performing any particular religious ceremonies, or undertaking any particular pilgrimages, we think that, regard being had to the social position of the family, and the annual value of the entire estate which has been found to be Rs. 70,000, and to the

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proportionate annual value of her son's portion of the estate, *viz.*, Rs. 23,333 or thereabouts, that Rs. 150 a month is a suitable allowance for her, and this she will be entitled to receive from the time when she may separate from her son.

We therefore direct that the decree of the lower Court be set aside; the suit, so far as the defendant No. 1 and the representatives of Annoda Pershad are concerned, be dismissed; the plaintiff's claim for back maintenance be also dismissed, but that a declaratory relief be granted to her as expressed above, as against the share of the estate left by Tara Churn Coondoo now in the hands of her son, the defendant No. 2.

As regards the costs, we think that the defendant No 1 is entitled to his costs both in this and the lower Court and as against him the suit is dismissed with costs.

J. V. W. *Decree varied.*

Before Mr. Justice Prinsep and Mr. Justice Beverley.

RAKHAL CHUNDER BOSE AND OTHERS (PETITIONERS) *v.* DWARKA NATH MISSER (DECREE-HOLDER) AND KALLY DASS MISSER (AUCTION-PURCHASER) AND OTHERS (JUDGMENT-DEBTORS)*

1886 *June* 22.

Civil Procedure Code, s. 311—*Application to set aside sale—"Person whose property has been sold"—Mortgagee—Transfer of Property Act (IV of* 1882), *ss.* 86, 87.

The mortgagees of a certain tenure obtained, on 11th September 1884 under s. 86 of the Transfer of Property Act, a decree for foreclosure, which declared that, on failure to pay the amount found due, the mortgagor's right of redemption should be barred on 11th March 1885; this time was subsequently extended on the application of the mortgagor to 30th April 1885. On the 6th April 1885, in execution of a decree for arrears of rent obtained by the superior holder of the tenure against the mortgagor, the tenure was sold free from incumbrances. The mortgagees applied under s. 311 of the Civil Procedure Code to have the sale set aside for material irregularity. *Held*, that, under s. 86 of the Transfer of Property Act, the mortgagees had such an interest in the property as brought them within the words of s. 311, "person whose property has been sold," and entitled them to make the application.

IN this case the judgment appealed from was as follows:—

* Appeal from Order No. 298 of 1885, against the order of Baboo Kanti Chunder Bhaduri, Munsiff of Satkhira in Khoolnah, dated the 5th of September 1885.

"This was an application to set aside a sale on the ground of material irregularity in publishing or conducting that sale. The application was made under s. 311 of the Code of Civil Procedure. The applicants are the mortgagees, and the question is whether the words 'any person whose immoveable property has been sold' in s. 311 of the Code of Civil Procedure do or do not include a mortgagee. The case of *In the matter of the petition of Bhagabati Churn Bhuttacharjee Chowdhry* (1) is in point. It has been there decided that the word 'property' in those words means property *de facto* and not property *de jure*. The mortgagee, in my opinion, is not the owner of the property *de facto*; but he is master of it *de jure*. He no doubt has a charge on the property, and even on the surplus of the proceeds of sale after payment of the rent, &c., for the arrears of which it was sold. This being so the petitioners cannot apply to the Court under s. 311 of the Code of Civil Procedure, and the application is therefore rejected, and the sale is confirmed."

From this decision the mortgagees appealed to the High Court.

Baboo *Troilokya Nath Mitter* for the appellants.

Baboo *Rash Behari Ghose* and Baboo *Sharoda Pershad Roy* for the respondents.

The judgment of the Court (PRINSEP and BEVERLEY, JJ.) was as follows:—

The appellants, who are the mortgagees of a certain tenure obtained a decree for foreclosure under s. 86 of the Transfer of Property Act. That decree was made on the 11th September 1884, and declared that, on failure to pay the amount due, the mortgagor's right of redemption should be barred on the 11th March 1885. In that month the mortgagor applied to the Court under s. 87 to enlarge the time, and on the 6th April the Court made an order fixing the 30th idem as the date on which the foreclosure would become absolute in the event of non-payment.

Meantime, the superior holder of the tenure obtained a decree against the mortgagor for rent, and in execution of that decree the tenure itself was sold on the 6th April 1885, (apparently)

(1) I. L. R., 8 Calc., 367; 10 C. L. R., 441.

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free of incumbrances. On the 10th April, the mortgagees applied under s. 311 of the Civil Procedure Code to have the sale set aside, and on the 5th September following the Court disposed of that application, holding on the authority of the case of *In the matter of the petition of Bhagabati Churn Bhuttacharjee Chowdhry* (1), that a mortgagee was not a person whose property had been sold within the meaning of that section. Against that order the mortgagees now appeal.

It is pressed upon us on their behalf that a decree for foreclosure having been made on the 11th September 1884, the proprietary right in the tenure passed to the mortgagees on that date, or if not then, at any rate on the 11th March 1885, the date on which the foreclosure was to become absolute—it being contended that the order of the 6th April enlarging the time could not have retrospective effect. On the other hand, it is urged that the proprietary right does not pass to the mortgagee until the foreclosure decree is made absolute, and that no such absolute decree has yet been made in this case.

We think that, looking to the terms of s. 86 of the Transfer of Property Act, it may fairly be said that the mortgagees had such an interest in the property as entitled them to make an application under s. 311 of the Code. A decree under s. 86 virtually has the effect of declaring the mortgagees' right to the property subject to the liability to "transfer" it to the mortgagor on payment of the sum found due within a certain date. If payment is not made on or before the date fixed, the mortgagor is "absolutely debarred of all right"—not to the property, but—"to redeem the property."

In such a state of things it would be as difficult to hold that, after a foreclosure decree, the property still belongs solely to the mortgagor, as it would be to hold that it is the property of the mortgagee. We think that either the mortgagor or the mortgagee, under such circumstances, would be entitled to apply to the Court under s. 311 of the Code, if he had reason to believe that the property had been irregularly or collusively sold. Were we to hold otherwise and to say that the mortgagee had no right to intervene under that section, the result would be that a mortgaged

(1) I. L. R., 8 Calc., 367; 10 C. L. R., 441.

property might be sold behind the back of the mortgagee for a very inadequate sum, and he might thus be deprived of the security for which he had already obtained a conditional decree, or driven to institute fresh legal proceedings to set aside the fraud that had been practised upon him.

We accordingly set aside the order of the Munsiff of the 5th September last, and direct that the appellant's application be heard. Appellants will have their costs in this appeal.

J. V. W. — *Appeal allowed.*

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Grant.

ABDUL HAMID *v.* THE EMPRESS.*

1886 *September* 7.

Forgery—Penal Code, s. 464—Intention in fabricating documents—Fraudulent and dishonest fabrication.

The accused, who was a copyist in the Sub-divisional Office at *B*, applied for a clerkship then vacant in that office. An endorsement on his application, recommending him for the post and purporting to have been made by the Sub-divisional Officer of *B*, was found to have been falsely made by the accused. The application was accompanied by a letter, also fabricated by the accused, purporting to be from the Collector to the Sub-divisional Officer at *B*, informing the latter officer that he, the Collector, had selected the accused for the vacant post. The Sub-divisional Officer, having some suspicion as to the genuineness of this letter, wrote a demi-official letter to the Collector to ascertain whether he had really written it; and this being posted in the local post office the accused fabricated a third document, purporting to be a letter from the Sub-divisional Officer to the post master asking him to stop the despatch of the demi-official letter. The accused was charged with, and convicted in the Sessions Court of the offence of forgery, under s. 464 of the Penal Code, in respect of the three documents. *Held*, the conviction was right with regard to the two first documents, but with regard to the third document it could not be said that he falsely made it either dishonestly or fraudulently within the meaning of that section.

THE facts of this case are sufficiently stated in the judgment of the Court (MITTER and GRANT, JJ.)

Baboo *Umbica Churn Bose*, for the appellant.

The Deputy Legal Remembrancer (Mr. *Kilby*), for the Crown.

* Criminal Appeal No. 491 of 1886, against the sentence passed by J. B. Worgan, Esq., Sessions Judge of Cuttack, dated the 28th of June 1886.

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The learned vakeel for the appellant has not contested the finding of the Sessions Judge, but has contended that upon that finding the Sessions Judge ought not to have held that the appellant made a false document within the meaning of s. 464 of the Indian Penal Code in respect of documents X, C, and K, which formed the subject of the charges framed against the appellant. The facts of the case are these: The third clerkship in the Sub-divisional Office at Budruck having fallen vacant, an application, purporting to have been made by the appellant who was a copyist in that office, reached the Collector of Balasore applying for the post. At the foot of this application there was an endorsement, purporting to have been made by the Sub-divisional Officer of Budruck, recommending the applicant for the post. The document marked X is the endorsement in question, and it has been found to have been falsely made by the appellant. The document marked C purports to be a letter from the Collector of Balasore to the Sub-divisional Officer at Budruck, informing the latter officer that he, the Collector, had selected the appellant for the vacant post. This is also found to have been fabricated by the appellant. A suspicion having arisen in the mind of the Sub-divisional Officer of Budruck as to the genuineness of this document, he wrote a demi-official letter to the Collector of Balasore to ascertain whether the document marked C was genuine. This letter was posted in the local post office. The appellant having got an inkling of this fact fabricated a letter purporting to be written by the Sub-divisional Officer to the address of the postmaster, asking him to stop the despatch of his demi-official letter. This document is marked K, and it has been also found that it was fabricated by the appellant. The appellant has been found guilty of forgery in respect of all these three documents, and has been sentenced by the Sessions Judge to three years rigorous imprisonment, that is to say, rigorous imprisonment for one year in respect of the forgery of each of these three documents. It has been found, and it is clear, that the object of the appellant in fabricating two of these documents was to obtain the vacant clerkship by deceiving the Sub-divisional Officer of Budruck and the Collector of Balasore. Upon these facts it was con-

tended before us that, under s. 464 of the Indian Penal Code, the appellant could not be held to have made a false document in any one of the three instances mentioned above. The contention of the learned vakeel is that, although he fabricated these documents, still it cannot be said that he fabricated them either dishonestly or fraudulently within the meaning of the definitions of these two words given in ss. 24 and 25 of the Indian Penal Code.

We are of opinion that this contention is not sound as regards the documents X and C. Whether or not, under the circumstances mentioned above, the appellant may be said to have fabricated these two documents "dishonestly," it is clear to us that he fabricated them fraudulently within the meaning of the definition of that word given in the Indian Penal Code. As already remarked, his object was to obtain the vacant post in the Sub-divisional Office at Budruck. His intention, therefore, in making these two false documents was to obtain some pecuniary advantage by deceiving the Sub-divisional Officer as well as the Collector. In fabricating X his intention was to deceive the Collector of Balasore; in fabricating C his intention was to deceive the Sub-divisional Officer of Budruck. He, therefore, made these two documents falsely with a view to deceive the Collector of Balasore and the Sub-divisional Officer of Budruck respectively, and with the intention of gaining a pecuniary advantage by securing his appointment to the post which was vacant in the Sub-divisional Office of Budruck. That being so, we think that he made these documents fraudulently within the meaning of s. 25 of the Indian Penal Code. But, as regards K, we are of opinion that the contention of the learned vakeel is correct. The intention with which the appellant made this false document was evidently to screen himself from detection of the fraud which he had already committed by fabricating the documents X and C. That being the intention with which K was fabricated, it cannot be said that he made that document falsely either "dishonestly" or "fraudulently." His intention was not to cause any wrongful loss to another or wrongful gain to himself, or to derive some pecuniary advantage to himself. The conviction, therefore, as regards K must be set aside, but

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the convictions as regards X and C will stand. Having regard to the gravity of the offence committed by the appellant we are of opinion that no lighter sentence than the one awarded by the Sessions Judge would meet the ends of justice. We, therefore, sentence the appellant to two years rigorous imprisonment in respect of the forgery of X, and leave the sentence as regards C unaltered.

The result is that the cumulative sentence of three years rigorous imprisonment awarded by the Sessions Judge will stand.

J. V. W.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice O'Kinealy, and Mr. Justice Macpherson.

1886 *August* 14.

SURENDER NATH PAL CHOWDHRY AND OTHERS (DEFENDANTS) *v.* BROJO NATH PAL CHOWDHRY AND ANOTHER (PLAINTIFFS.)*

Res-judicata—Admissibility in evidence of decree in former case.

The plaintiffs, as purchasers of a share of an estate, sued to recover their share of the rent of certain tenures held in that estate by the defendants. The defendants denied being in possession as alleged. Another co-sharer in the same estate had previously brought a suit against the same defendants for the rent of the same tenures, and in that suit the present plaintiffs and other co-sharers of the estate were made co-defendants, and the decision in that suit was that the present defendants were in possession and were liable to pay to the then plaintiff his share of the rent.

Held, (MITTER, J., dissenting) that the decree in the former suit was not a *res judicata* or even admissible as evidence in the present suit.

THIS case was referred to a Full Bench by McDONELL and GHOSE, JJ., on the 21st April 1886, with the following opinion :—

The plaintiffs, who are the proprietors of 1 anna 8 gundas share of a certain estate, Turf Ranaghat, sued to recover from the defendants Surender Nath Pal Chowdhry and others, their share of the rent said to be due on account of certain tenures

* Full Bench Reference in Appeals from Appellate Decrees No. 1740 and 1741 of 1885, from the decrees of J. Crawford, Esq., Officiating Judge of Zilla Nuddea, dated the 13th May 1885, reversing the decrees of Baboo Jogendra Nath Mitter, Munsiff of Ranaghat, dated 25th October 1884.

held by them by right of purchase. The main defence of the defendants was that the tenures had not been properly described in the plaint, nor were their boundaries and areas given, and hence they were unable to say whether the said tenures were in their possession. The result of this defence was that the plaintiffs were put to proof that the tenures alleged in the plaint were in the defendants' possession. It appears that another co-sharer of the same estate had previously brought a suit against these defendants for the rent of these very tenures, and in that suit the present plaintiffs and the other co-sharers of the estate were made co-defendants. The defence was almost identically the same as is raised in this case, and the Court which had to try the suit found that these defendants were in possession of the tenures, and were liable to pay to the plaintiffs in that suit their share of the rent.

The plaintiffs in this suit, in support of their case, adduced as evidence the judgment in the above case, and the main question that has been discussed before us is, whether the said judgment is evidence or not.

The lower Appellate Court has to a great extent relied upon the said judgment as evidence showing that the defendants are in possession of the tenures in question, and has accordingly given the plaintiffs a decree.

The appellants have contended before us that the said judgment is no evidence whatever under the Evidence Act, and that the result of the Full Bench decision in the case of *Gujju Lal* v. *Futteh Lal* (1) is to the same effect. It is argued, and it seems to us that this argument is well founded, that what the said Full Bench practically decided was that, except in the case of judgments *in rem*, and judgments relating to matters of public nature, a judgment in order to be evidence must be such as would operate by way of estoppel or *res judicata*.

A recent Full Bench of this Court, in the case of *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2), has ruled in a case where the parties were not arrayed as plaintiff and defendant in a previous suit, but as co-defendants, that the judgment in that suit is not *res judicata*. But the question was not

(1) I. L. R., 6 Calc., 171. (2) I. L. R., 12 Calc., 580.

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therein raised whether the said judgment, though not *res judicata*, was evidence or not.

If the result of the Full Bench decision in the *case of Gujju Lal* be as the appellants contend, then certainly the judgment adduced in this case should not have been received and acted upon as evidence. But then it appears that the authority of the said Full Bench case has been shaken by the subsequent Privy Council decision in the case of *Run Bahadur Singh* v. *Lucho Koer* (1) and by the decisions of this Court in the case of *Peari Mohun Mukerji* v. *Drobomoyi Dabia* (2), and in the case of *Hira Lal Pal* v. *Hills* (3), In the case before the Privy Council, although the Judicial Committee held that the previous judgment between the parties was not *res judicata*, they still treated such judgment as evidence in the case. It would also appear that the judgment in a certificate case under Act XXVII 1860, and a proceeding before the Magistrate in a recognizance case, were also relied upon as evidence by the Judicial Committee, and this they could not do if the contention raised by the appellants in the present case were correct. In the case of *Peari Mohun Mukerji* v. *Drobomoyi Dabia* (2) a judgment although not *inter partes* was held to be admissible as evidence as showing the nature of the possession of the defendant: and in the last mentioned case, *viz.*, the case of *Hira Lal Pal* v. *Hills* (3) a rent decree of a similar character was used as evidence for the purpose of showing that rent was successfully claimed for the lands which were in the subsequent suit alleged to be lakheraj.

We do not understand why, if the judgments which were dealt with in the two cases of *Peari Mohun Mukerji* and *Hira Lal Pal* could be properly used as evidence for one purpose or another, the judgment adduced in this case could not be used as evidence for the purpose of showing that, in the suit of another co-sharer of the same estate, it was found that the defendants were in possession of the tenures in question.

It seems to us that the question raised before us is of considerable importance, and one which often arises in our Courts; and we therefore think it necessary to refer the following

(1) I. L. R., 11 Calc., 301. (2) I. L. R., 11 Calc., 745.
(3) 11 C. L. R., 528.

question to a Full Bench: Whether under the circumstances stated, the judgment in the previous case is evidence or not.

Baboo *Rash Behary Ghose* and Baboo *Biprodas Mukerji* for the appellants.

Baboo *Srinath Das* and Baboo *Kishori Lal Sircar* for the respondents.

Baboo *Rasbehari Ghose* for the appellants.—The judgment referred to operates either as *res judicata* or is no evidence at all in the present case. It has not the effect of *res judicata*—*Brojo Behari Mitter* v. *Kedar Nath Mazumdar* (1). Therefore it is not admissible as evidence—*Gajju Lall* v. *Fatteh Lall* (2); *Davies* v. *Lowndes* (3) explained.

Baboo *Srinath Dass* for the respondents.—The decision in *Gajju Lall* is contrary to the provisions of the Evidence Act. It is clear from the concluding portion of s. 43 of the Act that judgments, although they may not operate by way of *res judicata*, are admissible in evidence if they are relevant under any other section of the Act. The authority of *Gajju Lall* (2) is narrowed down by subsequent decisions which govern the present case—*Run Bahadur Sing* v. *Lucho Koer* (4); *Peari Mohun Mukerjee* v. *Drobo Moyi Dabia* (5); *Hira Lal Pal* v. *Hills* (6).

Baboo *Kissori Lal Sircar* on the same side.—The present case is distinguishable from *Gajju Lal* (2). Without calling in question the authority of *Gajju Lal*, the judgment here is good evidence as showing the identity of the land in dispute, and is admissible under s. 9 of the Evidence Act. It is also admissible under s. 13, cl. (*b*) of the Act. *See* s. 13, Explanation V of the Civil Procedure Code; the judgment referred to is not only evidence but operates by way of *res judicata*.

Baboo *Rasbehari Ghose* in reply.—*Peari Mohun Mukerji* v. *Drobo Moyi Dabia* (5), and *Hira Lal Pal* v. *Hills* (6), are not applicable.

(1) I. L. R., 12 Calc., 580.
(2) I. L. R., 6 Calc., 171.
(3) 1 Bing. N. C., 606.
(4) I. L. R., 11 Calc., 301.
(5) I. L. R., 11 Calc., 745.
(6) L. R., 11 Calc., 528.

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The following opinions were delivered by the Full Bench:—

MITTER, J.—I would answer the question referred to us in the affirmative. For the reasons given by me in my judgment in *Gajju Lal* v. *Fatteh Lal* (1) I think that the judgment in the previous case is evidence under s. 9 of the Evidence Act bearing upon the question of the identity of the tenure in respect of which the present suit has been brought with the tenure in respect of which the previous suit was brought.

PETHERAM, C.J.—The plaintiffs claim to be entitled, by purchase, to a 1 anna 8 gundas share of an estate, under which estate they allege that the defendants hold certain tenures; and this suit is brought to recover their share of the rent of the tenures. The question referred to us is whether a decree obtained in a former suit by another sharer in the same estate against the same defendants is admissible in evidence, the object being to prove the defendants' possession of the tenures.

When that decree is examined, all that appears from it (and nothing but the decree itself was put in) is this: that the plaintiff in that suit had acquired also by purchase, a share in the same estate in which the now plaintiffs say they have a share, and he sued defendants for their separate share of the rent of the same tenures now in question, making the now plaintiffs co-defendants; they did not appear. Two defences were raised; first, a denial, or at least a refusal to admit possession of the tenures. This was found against the defendants. The second defence was limitation, on the ground that the person entitled to the particular share of the rent then sued for had not received any rent for more than twelve years. As to this, the Court said, first that there was some evidence of receipt of that share of the rent within twelve years; and, secondly, that however that might be, the defendants being in possession of the tenures were liable for the zemindari rent, and could not therefore repudiate any particular share of it. On this we think it clear that no question of *res judicata* can possibly arise. The test is mutuality. If the former suit had been dismissed, could it have been said that the now plaintiffs were barred? Might they not have said, we had and

(1) 1 Bing. N. C., 606.

have to do with our own shares, we neither knew nor cared about other people's shares: why should we have meddled in their suit?

Apart from *res judicata*, the question whether the decree referred to was admissible in evidence is, we think, concluded by the two Full Bench cases, *Gujju Lal* v. *Fatteh Lal* (1) and *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2).

As the judgment in question was the ground of decision in the lower Appellate Court this appeal must prevail. The decree of that Court will be set aside, and that of the first Court affirmed with costs in all Courts.

K. M. C. *Appeal allowed.*

(1) I. L. R. 6 Calc., 171. (2) I. L. R. 12 Calc. 580.